THEORIES OF ISLAMIC LAW

The Methodology of *Ijtihâd*

Imran Ahsan Khan Nyazee

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FOREWORD

"Islamic law," writes Joseph Schacht, "is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself" (*Introduction to Islamic Law*, Oxford, 1964, 1). Some might perhaps find an element of exaggeration in the characterization of Islamic law as the "core and kernel of Islam itself." Nevertheless, there can be no denying that among the world religions, law occupies a distinctively important position in Islam; a position possibly no less important than in the religious tradition of Judaism.

In recent decades, interest in Islamic Law has increased both in the Islamic world and outside. It was natural, in the first place, for the Muslims to desire, and even insist, that in the post-colonial era Islamic laws should replace the laws of colonial provenance. This provided an impetus for scholarly effort in the field of Islamic law. This is evident from the considerable number of studies that have appeared on Islamic law and jurisprudence during the recent decades. These studies have mostly been addressed to understanding substantive Islamic laws – the family law, the penal law, the civil law, etc., of Islam. Compared to these, the works dealing with *uṣūl al-fiqh* (Islamic jurisprudence) are scarce. Even more scarce are such studies in Western languages.

The most significant works on Islamic jurisprudence in English by Muslim scholars are Abdur Rahim's *Principles of Muhammadan Jurisprudence*. It is a competent work, but was written in the colonial setting obtaining at that time (being first published in 1905), and has thus become dated. The work of the Lebanese jurist Subhi Mahmassani, has been available in its English translation since 1961 under the title *Falsafat al-Tashrī' fi al-Islām*. More recently, a few works by Ahmad Hasan were published by Islamic Research Institute, Islamabad. In addition to the *Doctrine of Ijmā' in Islam* (1978) and

Analogical Reasoning in Islamic Jurisprudence (1986), the first of his projected four-volume work, *The Principles of Islamic Jurisprudence* was published in 1993. Another significant work that appeared in recent years is M. Hashim Kamali, *The Principles of Islamic Jurisprudence* (Selangor, Malaysia: Pelanduk, 1989), a comprehensive and lucid one-volume work on the subject.

Imran Ahsan Nyazee's *Theories of Islamic Law* thus forms part of the growing, but still scarce literature on Islamic Jurisprudence in English. The forte of Nyazee's work is that while it attempts a faithful exposition of Islamic Jurisprudence—a "traditional representation" as the author chooses to call it—it is addressed to both Muslims and non-Muslims; and above all, the author has written at the appropriate wave length for the students of legal studies. Nyazee's knowledge of jurisprudence seems both extensive and profound, and his understanding of "legal theories" sharp and incisive, which has made it possible for him to highlight significant parallels and dissimilarities between Islamic juristic concepts and approaches and those of other juristic systems. The author does not compromise a whit the uniqueness and distinctiveness of Islamic Law and Jurisprudence. But Islamic legal theories have been presented from the perspective of comparative jurisprudence and with such skill that the reader is enabled to sharply grasp the characteristics of Islamic Law that make it a distinct legal and jurisprudential system. There is hardly any work on Islamic jurisprudence which has made such a rigorous attempt to enable specialists in law to understand Islamic jurisprudence in terms they fully understand.

Theories of Islamic Law should help lay readers, lawyers, and university students to understand Islamic jurisprudence on its own terms. For, it is indeed a systematic exposition of Islamic jurisprudence, written in a clear and lucid style. The work thus eminently meets the requirements of a good text-book in Islamic jurisprudence. Unlike an ordinary text-book, however, Nyazee has presented in it some bold theses.

One of the major contentions of the author is that modern scholarship has tended to present a rather simplistic view of the Islamic legal theory. The general view it has presented is that there is a uniform legal theory in Islam. Such a view, in the opinion of the author, does not do justice to Islamic jurisprudence for it overlooks the rich diversity which characterizes it. Instead of one, contends the author, there are at least three legal theories, each of which has been explained by the author in some detail and with remarkable lucidity.

Each of these theories has played a useful role in the past and each can play even today a vital role in the development of Islamic law.

Likewise, the author tries to explain the paradox of the so-called rigidity of Islamic law at the theoretical level accompanied with a perceptible degree of laxity in practice. The author has forcefully argued that the Islamic Legal system comprises two cooperating spheres. The first sphere is relatively fixed since it is focused on given texts. This sphere falls within the domain of the jurists. The other sphere, which draws upon the general principles of Islamic law, regulates the law made by the state. These are separate but complementary spheres. Neither is the relative fixity of the first sphere a manifestation of the Muslim jurists' mental rigidity. Nor is the flexibility of the second sphere the manifestation of any cynical disregard of the revealed texts on the part of the rulers.

The author has expressed his views boldly and candidly. It would be natural for many scholars to disagree with the conclusions of the author. If these disagreements spur them to serious research and study, to carefully examine the variety of theses and hypotheses contained in this work, one of our major purposes in publishing this study would have been fulfilled. For it is our firm conviction that a great deal of rigorous and meticulous research is necessary for a better and deeper understanding of Islamic jurisprudence. In fact, the effort at an in-depth understanding of Islamic jurisprudence is, in certain respects, even more consequential than the effort to understand substantive Islamic law. For our familiarity with Islamic jurisprudence is bound to deepen our comprehension of Islamic Law and enable us to grasp the rationale of the fine and subtle considerations underlying the divergent opinions of Muslim lawyers. A better understanding of Islamic jurisprudence also seems necessary to transform Islamic law into a legal system of contemporaneous relevance. For on the one hand it would obviously be preposterous for the present generation of Muslims, especially of their scholars, to turn a blind eye to the great intellectual heritage of legal doctrines bequeathed by the Muslim jurists and lawyers of the past. On the other hand, there is no reason to believe that the last and final word on Islamic law was said several centuries ago and that the legal doctrines developed by the earlier jurists have to be uncritically maintained, *in toto*, by the present generation of Muslims. Every generation, notwithstanding its reverence for its ancestors, has to carry its own cross; has to fall back on its own brain power to solve its problems.

While welcoming this maiden work of the author, we fervently hope and pray that he may have a long, productive academic career in which he might enrich the tradition of Islamic legal scholarship.

Zafar Ishaq Ansari

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Chapter 1

Introduction

Uṣūl al-fiqh or Islamic jurisprudence is the queen of Islamic sciences. It has been developed, refined, and applied for the derivation of the law by some of the greatest Muslim minds, throughout the ages. The reason why it has been the object of so much interest in the past is that a thorough understanding of this discipline is a prerequisite to the study of Islamic law, *tafsīr*, and *ḥadīth*. What was true in the past is true today. Today, expertise in the subject is essential not only for the Muslim lawyer, but for all those occupied with the study of Islam in general.

It is unfortunate, however, that in the present times the discipline of *uṣūl al-fiqh* is not given the attention and care it deserves. This is not to say that it is not taught in our institutions of Islamic learning, or even in our law schools. It is, but the methods adopted are not adequate. One cause of the lack of interest could be that there is very little attempt to explain what the subject might mean to a modern Muslim lawyer or a judge. A person trained in modern law does not even know how to approach the subject for it is never explained to him how he might relate it to concepts familiar to him. This is true even when the subject is expounded in languages other than Arabic. A reflection of this fact is to be found in the hesitation that prevails about assigning a title or name to the subject in English. A brief comparison with the science of Western jurisprudence might help elucidate this point.

Uṣūl al-fiqh has been assigned different titles by different writers, who attempt to understand what it really stands for. It has been called "Islamic jurisprudence," "Islamic legal theory," and "the methodology of Islamic law," besides other things. Those who fail to relate it to corresponding fields in the law, sometimes prefer to retain

the original name of *uṣūl al-fiqh*. There is nothing wrong with this, though, and all these titles are essentially correct, but the content and scope of the subject remain vague for the modern lawyer. There is, thus, a need to explain its meaning in a little more detail.

Part of the trouble in explaining the meaning of *uṣūl al-fiqh* lies in determining what we mean by jurisprudence itself, in the Western sense of the term. Western jurisprudence today has come to be divided into two major areas: general jurisprudence and particular jurisprudence.[1] Institutions of legal learning in countries like Pakistan are still occupied solely with particular jurisprudence, while the Western world has moved away from it toward general jurisprudence. Particular jurisprudence deals with legal concepts that cut across different branches of law, that is, concepts like right, property, and duty. This is the area of jurisprudence that was expounded by writers like Salmond a long time ago. General jurisprudence, as the title implies, deals with broader questions. It deals with the nature and concept of law itself: What is law? Why do we obey it? What is the nature of obligation? How do judges discover and apply the law? How are laws validated? What constitutes a legal system? What role has morality to play in a legal system?

These and other questions of legal philosophy underlie this fascinating field that took hold in the West in the last few decades, and continues to dominate the work of legal philosophers. A study of the works of legal philosophers like H.L.A. Hart, Lon Fuller, Joseph Raz, and Ronald Dworkin reveals that general jurisprudence is the same thing as *uṣūl al-fiqh*, though the legal materials it operates on are secular in nature, while the materials for the latter are divine in origin. Nevertheless, both are legal materials. What is surprising is that the issues faced by Western legal philosophers today were approached by Muslim jurists more than a thousand years ago. It is true that the language used by Muslim jurists was different, or some of the sophistication found today in modern legal systems was lacking in those days, but the basic questions answered are the same. A study of *uṣūl al-fiqh* today must bridge this gap and relate the discussions through a common language. A study of Islamic legal theory or *uṣūl al-fiqh*, to be useful in the present age, must answer some fundamental questions. A few of these are:

[1] The division of jurisprudence into general and particular is followed by some legal philosophers. See, e.g. J. W. Harris, *Legal Theories* (London, 1980) 1–5, 88-89.

- What is Islamic law?
- What is the structure of the Islamic legal system, as it emerges from the works of the earlier jurists? Would this structure be viable today?
- How was the law derived by the earlier jurists from the sources of Islamic law? How is it to be derived today? To put it differently, what will be the methodology of the modern judge in discovering and applying the law?[2]
- Who was authorized to declare a law as Islamic, that is, how was the law validated? How will the law be validated as Islamic in the modern age?[3]
- What is the scope of this law? Does it cover each aspect of a Muslim's life, or is it limited to what is contained in the books of *fiqh*?
- If it applies to all legal activity, then, why was there, in Islamic legal history, a separation between the functions of the Muslim jurist and the legislative and judicial functions of the Islamic state?
- What fundamental rights have been granted to Man under Islamic law, and how is justice according to law to be secured?

Books on *uṣūl al-fiqh*, written in modern times, whether in Arabic or in English or another language, do not answer all these questions,

[2]To explain the methodology of the jurist in discovering and applying the law, scholars usually quote the tradition of Mu'ādh ibn Jabal. The tradition as quoted in *Sunan Abū Dāwūd* is: "When the Apostle of Allāh intended to send Mu'ādh ibn Jabal to the Yemen, he asked: How will you judge when the occasion of deciding a case arises? He replied: I shall judge in accordance with Allāh's Book. He asked (What will you do) if you do not find guidance in Allāh's Book? He replied: (I will act) in accordance with the *Sunnah* of the Messenger of Allāh. He asked: (What will you do) if you do not find guidance in the *Sunnah* of the Apostle of Allāh and in Allāh's Book? He replied: I shall do my best to form an opinion and spare no pains. The Apostle of Allāh then patted him on the breast and said: Praise be to Allāh Who helped the messenger of the Apostle of Allāh to find a thing which pleases the Apostle of Allāh." *Sunan Abū Dāwūd*, tr. Ahmad Hasan (Lahore: Sh. Muhammad Ashraf, 1984), iii, No. 3585, 1019. The broad methodology based on the tradition of Mu'ādh ibn Jabal is essentially correct, but is somewhat simplistic when viewed in terms of a modern legal system. Al-Ghazālī (d. 505), for example, says that one should first consult *ijmā'* (consensus of opinion) for settled principles. It is customary with the *fuqahā'* to quote this tradition in support of the use of reason in matters of *fiqh* or *shari'ah*.

[3]For a layman, the law laid down by his school is valid law. This is fine as far as personal law is concerned, but what is valid law in the public sphere is an issue that is not clearly settled.

or at least they do not answer them adequately.[4] Major sections of books based on the pattern established by Abdur Rahim, or that established by works in Arabic, are devoted to a description of the sources of Islamic law. While a description of the sources is important in itself and was first followed by the earlier jurists, it is not sufficient, alone, to equip the student or the lawyer with skills that will enable him to derive the law in the present age, let alone practice it within a modern legal system. Much more needs to be done.

A comprehensive theory or a framework needs to be developed by Muslim scholars, jurists, and judges. This theory must answer and accommodate all the questions listed above. Needless to say, such a theory does not exist today, nor have attempts been made to formulate one. To develop the theory, Muslims occupied with the study of Islamic law must first understand and analyze the work of earlier Muslim jurists, and then attempt to relate their analysis to the circumstances obtaining today. Such works should not be undertaken in isolation, and these scholars must discuss and debate the important issues. It is to be acknowledged that some scholars have undertaken comparative studies of Islamic legal theory, where similarities with Western law have been indicated, yet, a broader theory that encompasses the whole gamut of interpretation in the light of modern needs cannot be derived from such works. We have attempted a first step in this direction in this book, in the hope that others will participate in the process and thus contribute to the development of a modern theory of Islamic law that will explain the whole enterprise of interpretation and define some strategies of Islamization for the present age.

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[4] See, e.g., Abdur Rahim, *Muhammadan Jurisprudence* (Madras, 1905) (hereafter cited as *Jurisprudence*); Noel J. Coulson, *A History of Islamic Law* (Edinburgh, 1964) (hereafter cited as *History*); *Conflicts and Tensions in Islamic Jurisprudence* (Chicago 1969) (hereafter cited as *Conflicts and Tensions*); Ignaz Goldziher, *Introduction to Islamic Law and Theology*, tr. A. & R. Hamori (Princeton, 1981); *Die Zâhiriten: Ihre Lehrsystem und Ihre Geschichte* (Leipzig, 1884). This has been translated Wolfgang Behn, *The Zâhirîs* (Leiden, 1971) (The translator has corrected a number of errors in citations and follows a modern method of transliteration). See also Joseph Schacht, *The Origins of Muhammadan Jurisprudence*, rev. ed. (Oxford, 1953) (hereafter cited as *Origins*); *Introduction to Islamic Law* (Oxford, 1964) (hereafter cited as *Introduction*). In addition to these, there is a large number of articles written by Schacht and Coulson on various topics. Some other scholars have also written important articles on the field. There are many other books on Islamic jurisprudence, but those mentioned here are the early authoritative books that established a pattern followed by later writers. The same pattern is still in vogue.

This book, therefore, differs from those written, in English or Arabic, by modern Muslim scholars in three respects. First, it attempts to link the ideas and concepts in *uṣūl al-fiqh* to those in law, especially ideas in English common law. This has been attempted partially in some books written in this century. Second, it does not treat the discipline of *uṣūl al-fiqh* as a common legal theory, as is portrayed by many modern books, and is maintained by Western scholars, though for different reasons. On the other hand, it treats the discipline as incorporating three main approaches to the derivation and development of the law. Each approach or theory has a distinct function to perform in the modern age. Third, this book attempts to show how the theories of Islamic law may be applied today to serve and develop a modern legal system. The reason why we have chosen to treat the subject of *uṣūl al-fiqh* in this way is based on our conviction that the form in which the subject is presented by Muslim scholars of the present times is of limited benefit to those dealing with English common law. Similar observations have been made by others too.[5] This is not to say that books written by modern scholars are not useful at all. Indeed, these books may be highly useful in countries where the obtaining legal systems are based on European civil law.

Nevertheless, we have retained, as far as is possible, the essence of the traditional pattern on which the books of *uṣūl al-fiqh* are written, so that the reader accustomed to them may not feel distracted. This pattern was adopted by the well known Ḥanafī jurist Ṣadr al-Sharī'ah (d. 757), and is followed with some modification by modern books written in Arabic. Ṣadr al-Sharī'ah divided his book into four parts: definitions, rules of literal construction, sources, and the *ḥukm shar'ī*. Modern books discuss the *ḥukm shar'ī* first. We have done the same.

The structure of the book, which is divided into three parts, differs in certain other ways as well. After two introductory chapters highlighting a few major themes and the meaning of *uṣūl al-fiqh*, the first part deals with the *ḥukm shar'ī*, which is a discussion of the concept of Islamic law. The second part is devoted to three main legal theories or approaches to the derivation and development of Islamic law. A description of the sources of Islamic law and the rules of literal construction has been kept to a minimum, as these are well known and can be gathered from any book on Islamic jurisprudence,

[5] See Riazul Hasan Gilani, *The Reconstruction of Legal Thought in Islam* (Lahore, 1974) iv.

yet points deemed essential have been woven into the description of the theories. Where it is felt that some readers may need more explanation of important sources, terms, or rules, the details have been moved to the footnotes. The third part deals with the methodology through which the legal system may incorporate and employ, in the present age, the theories of interpretation that are the subject-matter of the discipline of *uṣūl al-fiqh*.

As we have endeavored to develop a theory that explains the various aspects of Islamic law mentioned above, some of the ideas expressed may appear new to the reader, who is accustomed to traditional books. Most of what we have stated is based on more than a decade of research and study of this law, and we invite such scholars to propose better explanations or theories, and to amend and improve the ideas presented here. The effort, as stated earlier, is to generate fruitful discussion so that the collective effort of Muslim scholars may yield a system that can easily translate the ideals of Islam into an efficient modern law.

Chapters have been numbered consecutively throughout the book, irrespective of the division into parts. The system of transliteration for Arabic adopted here is based on the one followed by the American Library of Congress. The reader may, therefore, notice some differences from the transliteration system to which he might be accustomed. For example, *iyy* is represented by *ī*y. Thus, Ibn Taymīyah instead of Ibn Taymiyyah or Ibn Taimiyya. Footnotes were preferrred in this text for ease of referrence. These have been numbered separately for each chapter. Wherever the name of the Prophet is mentioned, the words "God's peace and blessings be upon him," are intended to be implied without having been specifically recorded in the text, as is the usual prayer for all his Companions.

I would like to thank Dr. Zafar Ishaq Ansari, who has been very kind to me in so many ways. He read the manuscript twice and made very useful suggestions with respect to content as well as style. I am also grateful to him for having agreed to edit and publish this book.

Chapter 2

Major Themes

Uṣūl al-fiqh has been called Islamic legal theory on the analogy of modern law. Like legal theory *uṣūl al-fiqh* answers the questions "What is law?" and "How do judges discover and apply the law in hard cases?"[1] But the analogy ends here. While legal theory analyzes what judges do, *uṣūl al-fiqh* lays down the methodology that must be used for discovering and applying the law. Legal theory attempts to understand and record the nature of the judicial process, *uṣūl al-fiqh* governs it. Thus, there is a difference in function and approach. The role of *uṣūl al-fiqh* is much wider than that of legal theory. This, at least, is the prevailing view.[2]

In response to the question "What is law?" *uṣūl al-fiqh* explains the origin and nature of law as well as the structure of the Islamic legal system. It describes in detail why the law is analyzed into different categories and how the interaction of primary and secondary rules takes place. Comprehension of this structure is essential for understanding the nature of Islamic law itself. On these issues, the ground covered by *uṣūl al-fiqh* and general jurisprudence is common.

In the Islamic legal system, a rule of law in order to be valid has to be derived from the sources of Islamic law. This is accomplished by the use of an acceptable system of interpretation. *Uṣūl al-fiqh*

[1] Hard cases are those where the statute does not cover the set of facts presented to the court, and the court has to resort to the general principles of the law. For a detailed discussion see R. Dworkin, "Hard Cases," *Harvard Law Review* 8 (1975), 1057.

[2] We will have occasion to see later that this is not binding in Islamic law. It is merely an assumption made by later scholars who laid greater stress on the methodology provided by al-Shāfi'ī (d. 204 A.H.).

imparts instruction about the available systems of interpretation and their proper use. It is, in fact, the heart of the subject for it tells us how the rule is derived. It also explains why each school of Islamic law[3] is a different system of interpretation that influences, by its methodology, the outcome of the opinions reached in *fiqh*, that is, the derived rule. In addition to this, it defines the area in which *ijtihād* or interpretation can be undertaken and identifies the persons qualified to do so. It, then, lays down its own system of *stare decisis* through a process called *taqlīd* that informs us what opinions or decisions are to be relied upon and in what order of priority. Above all, *uṣūl al-fiqh* tells us that in order to interpret the sources for the derivation of detailed rules we may not, if we choose, follow any of the well-known systems of interpretation, but to exercise such a choice we must replace the existing systems with a consistent system of our own. If such a system of interpretation is absent or is not formulated, a vacuum is created and the rules put forth as Islamic will not be validated by the underlying rule of recognition of Islamic law.

In Muslim countries, involved with the Islamization of laws, the first issue that is faced is couched in the question: How to interpret Islamic law in the present age? It will not be an exaggeration to say that any development in Islamic law today depends upon the comprehension, development, and adaption of *uṣūl al-fiqh*. In Western systems a familiarity with legal theory is not essential to the practice or study of law, but a systematic study of *uṣūl al-fiqh* is a necessity for all those who wish to practice, teach, or study Islamic law. It is unavoidable, particularly for those occupied with the framing or application of Islamic laws in Muslim countries, and is equally essential for non-Muslims occupied, for various reasons, with the study of this law. If, however, one group that needs it most were to be singled out, a group that must undertake a penetrating study of this field, it would comprise the judges of the higher courts in Muslim countries who are responsible for laying down the law and its general principles.

The study of *uṣūl al-fiqh* must, therefore, have a purpose. It must help us evolve a methodology and a system through which we can

[3] A school of law in the Islamic legal system is usually associated with the name of its founder. This is true, at least, of the Sunni schools. A school of law, besides being an internally consistent system of interpretation lends uniformity to the law. It is generally known that there are multiplicity of opinions within the Islamic legal system. By following a school of law the follower accepts a uniform version within this rich variety.

validate all new laws as Islamic, besides converting the current laws. The overall purpose has already been indicated in the questions listed in the introduction, but the present book will revolve around certain important issues. Focusing on these issues will not only help us understand the subject better and to remove some misconceptions, but also provide us with an opportunity to identify the utility of this discipline within a modern legal system.

To facilitate such a study, some of the important issues that may be discussed in detail in this book are described briefly to attract the attention of the reader. The first such issue relates to *ijtihād*.

2.1. *Ijtihād* through a grundnorm

Ijtihād means striving to the utmost to discover the law from the texts through all possible means of valid interpretation. The main purpose of the subject of *uṣūl al-fiqh* is to teach the art or methodology of *ijtihād*. This methodology is difficult, if not impossible, to learn in a vacuum. For the purposes of this book, Pakistan will be used as the model. The reason for this is quite natural for this writer, but it is expected that the explanations provided will be of benefit to all Muslim countries, especially those functioning under the common law. Examples, where necessary, will be based on judgements rendered by the superior courts in Pakistan. After the methodology of *ijtihād* has been absorbed from the traditional literature, it will be shown how a country like Pakistan is slowly adjusting to it, and how its senior judges are gradually taking up the responsibility that ultimately will be theirs, along with the lawyers who cooperate with them. Their methodology for validating the law vacillates between a grundnorm and a rule of recognition, sometimes benefiting from both. The explanation of this topic is one of the aims of this book.

2.2. Is there a common theory of interpretation?

The study of *uṣūl al-fiqh* in modern times has fallen prey to some rigid and preconceived notions that have concealed its true nature. One such rigid notion that has taken hold in the Muslim world today is that *uṣūl al-fiqh* represents a common theory of Islamic law, and that lawyers, judges, or scholars are free to base their interpretation on the opinion of any jurist, whatever the affiliation of such a jurist. In other words, they believe that they may follow a rule of interpretation adopted by the Ḥanafīs, for example, and at the same time

follow another rule upheld by the Shāfi'ī school. Questions of internal analytical consistency are ignored by the proponents of such a view.[4]

This notion has arisen from the apparent uniform nature of the subject. Pick up any book on *uṣūl* written by the earlier jurists and you will find that it contains the statement: "There are four sources of Islamic law...." These books appear to present the discipline as if it were a single uniform theory. This impression, arising from these books, and the consequent notion prevailing among scholars, in the opinion of this writer, has led to difficulties in understanding the true nature of legal theory in Islamic law. The truth is that there is not one but several theories of interpretation in this law. These theories of the jurists can only be understood by appreciating the detailed principles preferred by each school.

A multiplicity of theories of interpretation in no way indicates discord or tension within the Muslim community. On the other hand, it indicates an unparalleled richness and variety in a system of law that accommodates within its fold a large number of distinct races, cultures, and geographical regions.

The desire to consider *uṣūl al-fiqh* as a single uniform theory has also led to some uncertainty as to how Islamic law is to be interpreted in modern times to deal with new situations. The clearest example of the vagueness that surrounds the issue of interpretation is the proposed use of the principle of *maṣlaḥah*.[5] The principle is advocated with great fervor, but there is no explanation as to how it is to be used by the modern judge, or how it fits into the general scheme of things. The reason is that this principle does not sit well with all theories; it is only one theory that absorbs it. *Maṣlaḥah* can only be used if its relationship with this theory is clearly understood.[6]

The idea that there is a common legal theory is not upheld in the Muslim world alone; it is also maintained in the West. Western

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[4] No one can deny, however, that the jurists writing on *uṣūl*, that is, *uṣūlis*, following al-Ghazālī (d. 505 A.H.) have tried to reconcile the principles of various schools. How far they have succeeded is difficult to say. If at all some jurist has succeeded it is al-Ghazālī himself, who presented a new theory of the purposes of the law or that of jurisprudential interests. This theory, however, is not the same as the imaginary "classical theory of law."

[5] Erroneously referred to either as "public interest" or as "utility."

[6] Though the principle of *maṣlaḥah* is attributed to Mālik, it is al-Ghazālī's theory that reveals this principle in full bloom. The relationship between al-Ghazālī's theory and the principle of *maṣlaḥah* will be explained in detail in Part 2.

scholars insist that there is one theory known as the "classical legal theory." They also claim that this classical theory has nothing to do with the actual development of Islamic law as practiced by each school. This view was clearly stated by Joseph Schacht and has been maintained ever since by several Western scholars. He said: "Common legal theory, the discipline of *uṣūl al-fiḳh*, has little relevance to the positive doctrine of each school."[7] The truth is that there is hardly such a thing as a "common legal theory."[8] It is only a figment of Schacht's imagination. As there is no common legal theory, it obviously cannot have anything to do with the positive doctrine of each school, or any school for that matter. It is the separate and independent theories of the schools that form the basis of the positive doctrine, or doctrines.

The four Sunnī schools of Islamic law are not sects. Each school has been organized around a legal theory that it upheld and practiced for the derivation of law. This would mean that there are at least four theories of law within the Sunnī schools. A fifth theory would be that of the Ẓāhirīs, a school that became extinct. Each school with its individual theory can be shown to be an independent system of interpretation, a system that is internally consistent, which means that it must be followed as a whole or not at all. An attempt to merge or combine two systems of interpretation would lead to a new theory of interpretation. This would be permissible only if the new theory is developed as a whole and is also internally consistent. Such attempts have been made in Islamic law, though the jurists advancing their theories have rarely claimed that they were proposing new theories outside their schools. There is no restriction, however, and there has never been one, on the formulation of new theories by competent jurists. Today, qualified jurists may advance fresh theories, if such theories are indeed needed.[9] One outstanding example of a new theory presented in the fifth century is that of the theory proposed by al-Ghazālī (d. 505), a theory that has not been put to practice as yet.[10]

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[7] Schacht, *Introduction*, 60. By positive doctrine he means the law stated in the books of *fiqh*.

[8] This will be explained in detail in this book.

[9] New theories are expected to emerge in the present times through the collective efforts of scholars, judges, and lawyers.

[10] This theory bridges the gap between the past and the present. It provides answers that have long been sought by modern Muslim writers.

The second part of this book will be devoted to the explanation of these theories, and to the removal of some misconceptions that have penetrated the field of *uṣūl al-fiqh*. We may now turn to another misconception about the alleged separation between the work of Muslim jurists and the practice of the Islamic state in the administration of justice according to the *sharī'ah*.

2.3. Separation between theory and practice?

An idea that has taken hold in the West is reflected in the doctrine of separation between theory and practice, that is, the law expounded by the jurists and the practice of Muslim rulers or the state over the centuries. The idea was advanced by scholars like Weber and Schacht, and is avidly pursued by many scholars today. A student of Islamic legal history cannot fail to notice that Muslim rulers did establish institutions like the *maẓālim* courts, the office of the *'āmil al-sūq*, the institution of *ḥisbah*, and some others.[11] It may appear strange to some that the early Muslim jurists never discussed these institutions in their regular manuals of law. It is only seldom, and that too as a passing reference, that the *fuqahā'* mention the powers of the ruler under the doctrine of *siyāsah*.[12] This indicates to Western scholars that Muslim jurists and the state were apparently going their separate ways. These writers have assumed that institutions and laws made by Muslim rulers were secular, and had nothing to do with the *sharī'ah*. Even the taxes imposed by these rulers are deemed to be extra-*shar'ī*. In other words, Western scholars attempt to confine the *sharī'ah* to what is stated in the books of early Muslim jurists, while they designate the laws made by the rulers as secular.

Coupled with this is their theory that Islamic law, as found in the books of the jurists, grew in an atmosphere of political opposition to the rulers. As there were no political parties, it is assumed that opposition groups gathered around the jurists to give vent to their feelings.

It is possible that all this may have happened on some occasions, but there is no concrete evidence for these assumptions, that is, for

[11] It was first al-Māwardī and then Ibn Khaldūn who described these institutions in some detail.

[12] The only books that discuss the authority of the ruler or the state are books entitled *al-Aḥkām al-Sulṭāniyah*. These books do not have the status of regular manuals of law. The doctrine of *siyāsah* is mentioned in later books like those by Ibn Taymīyah, Ibn al-Qayyim, and Ṭarābulusī.

the assumption that the laws and institutions established by the state were not valid according to the principles of Islamic law or the *sharī'ah*, or that the law laid down by the *fuqahā'* always developed in opposition to the ruling group. Had this been true, the attitude of confrontation would have emerged in some form in the law. There is, as has been stated, no evidence in the law-books of earlier jurists about the legality or illegality of these institutions, or even a hint of some kind of confrontation between the rulers and the jurists. On the contrary, there appears to be perfect harmony between the two. Yet, the early Muslim jurists avoid all discussion of these institutions and laws, as if they were outside their jurisdiction or domain. The desire of Western writers to identify such a separation between theory and practice appears to be based on identifying and relating this development with a parallel development in Roman law.[13] There is no justification for this.

Muslim scholars, on the other hand, are wont, on the whole, either to ignore this issue completely and not to address it, or they assume that these institutions, established by the rulers for the administration of justice, were a part of the regular *sharī'ah* law. The latter writers give the impression that there was no separation between the writings of the jurists and the judicial activity of the state. Perhaps they base such conclusions on the writings of later writers like Ibn Taymīyah (d. 728 A.H.) and Ibn al-Qayyim (d. 751 A.H.). The legal justification provided by these notable scholars for such institutions in no way indicates that there was no separation between the practice of the state and the work of Muslim jurists. In addition to this, there are some Muslim scholars who silently agree with the Orientalists on this point, but they do this without elaborating the consequences of such agreement.[14] A recent book written on Islamic jurisprudence, though presenting the traditional Islamic point of view conforming with the writings of Arab scholars throughout the book, has the following statement to make in the preface:

> *[U]ṣūl al-fiqh* has for the most part been developed by the individual jurists who exerted themselves in their private capacity away from the government machinery and involvement of juristic thought. Consequently, *uṣūl al-fiqh* has to some extent

[13] Such conclusions were drawn by Max Weber, through an apparently superficial study of Islamic law, and Schacht followed him—almost blindly.

[14] See, e.g., Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, (Petaling Jaya: Pelanduk Publications, 1989) xvii.

> remained a theoretical discipline and has not been internalized by the legislative machinery of government. The history of Islamic jurisprudence is marred by a polarization of interests and values between the government and the ulema. The ulema disaffection with the government did not encourage the latter's participation and involvement in the development of juristic thought and institutions, *and this has to some extent discouraged flexibility and pragmatism in Islamic jurisprudence*.... The government on its part also did not encourage the ulema involvement and participation in its hierarchy and isolated itself from the currents of juristic thought and the scholastic expositions of the ulema. The schools of jurisprudence continued to grow and succeeded to [sic] generate a body of doctrine, which however valuable, was by itself not enough to harness *the widening gap between the theory and practice of law in government*.[15]

Notwithstanding the erudition of the author, it must be pointed out that the statement implies that not only is the Islamic law derived by the *fuqahā'* rigid, but there was a widening gap between theory and practice because of the confrontation or isolation between the *fuqahā'* and the government. This is exactly what Joseph Schacht has said, both as regards rigidity and the gap between theory and practice. The only difference between this statement and those made by Western scholars is that the learned author has not said that the laws and practices of the Muslim state were secular in nature and that the taxes imposed by the state were extra-*shar'ī*.

The position taken in this book is that there was a definite separation between the output of the jurists and the laws and institutions set up by the state, but this was achieved in perfect harmony, and in accordance with the unique design of the Islamic legal system. This separation did not exist in very early times, and appears to have developed in the later days of the Umayyads, when the law had attained maturity. Some of the areas of law discussed in the early works of the Ḥanafī jurists, for example, were later to fall within the exclusive domain of the state. The separation appears to be complete by the time of al-Shāfi'ī (d. 204). Does all this mean that jurisdiction over certain areas was assumed forcibly by the state and the authority of the jurists was eliminated? Definitely not. The arrangement appears to have been arrived at through an agreement of both parties, that

[15] Ibid. Emphasis added.

is, the jurists and the rulers. The assumption for purposes of this book is that a separation between the functions of the jurists and the judicial activity of the state was achieved in perfect harmony. Indeed, this is a unique feature of Islamic law.

The agreement, as gathered from the works of the jurists, appears to be that the *fuqahā'* would have jurisdiction over the area of law that could be derived directly from the texts, an area that was a permanent part of the law, while the state would make laws, under the power of *ijtihād* available to the ruler, in areas where the law was likely to change with the times, or in accordance with the policy (*siyāsah*) of the rulers. In other words, the jurists devoted their energies to the eternal part of the law that would never change, whether the state was secular or Islamic, because it was a law that was derived directly from the texts of the Qur'ān and the *Sunnah*, a law that could, except for *ḥudūd* and *qiṣāṣ*, be practiced as personal law even by Muslim minorities. This practice appears to have continued right up to the Ottoman times in Turkey, and up to the time of Awrangzeb[16] 'Ālamgīr in India.

In contrast, the law made by the state was also based on the *sharī'ah*, but it was derived from general principles in most cases rather than from specific texts of the Qur'ān and the *Sunnah*. Western writers are still making efforts to show that the law codes laid down by Ottoman rulers had nothing to do with the *sharī'ah*, but here and there a statement appears stating clearly that this law was made in accordance with the principles of the *sharī'ah* and with the approval of the *Shaykh al-Islām*, the leading jurist of the times. In fact, wherever a discord between the *qānūn* and the *sharī'ah* was found in Ottoman times, an effort was made to achieve harmonization. Consider the following quotation from a *firmān* as recorded in a book written on Ottoman criminal law by Uriel Heyd:

> It is also highly perilous and most sinful to juxtapose the [ ] *sharī'a* and *qānūn*. Therefore in firmans and decrees all matters shall henceforth be based on the firm support of the noble *sharī'a* only. (Excerpt from a firman of Mustafa II (1695-1703))[17]

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[16]The Arabic transliteration of this name as Awrangzīb is being avoided intentionally.

[17]See Uriel Heyd, *Studies in Old Ottoman Criminal Law*, ed. V. L. Ménage (Oxford, 1973), 154. See also 'Aṭā'ī, *Ḥaqā'iq al-Ḥaqā'iq fī Takmilat al-Shaqā'iq* for some ideas on how the *sharī'ah* and *qānūn* were harmonized in Turkey.

The question is whether such laws of the *qānūn*, that were harmonized with the *sharī'ah*, are binding on later ages? The answer is in the negative, because such laws, even though they were based on the *sharī'ah*, were meant for a particular age and were meant to change with the times, in accordance with the *ijtihād* of the *imām*.

Working on the basis of the assumption that the agreement between the jurists and the state was achieved in a spirit of cooperation, the logical conclusion would be that Islamic law operates in two spheres, which exist in perfect harmony with each other. One sphere is permanent, having been derived directly from the texts, while the other is flexible and changes with the times. The flexible sphere revolves around the permanent and fixed sphere and draws, or should draw, its principles and inspiration from the inner sphere. The jurists (*fuqahā'*) are responsible for the development of the laws in the inner sphere, while the state or the ruler, who is supposed to be a *mujtahid* (a qualified jurist), is responsible for the flexible and changing sphere. If the ruler (*imām*) develops the law and lays down a policy in accordance with the inner sphere, Ṭarābulusī, the author of *Mu'īn al-Ḥukkām* calls it *siyāsah 'ādilah* or administration of justice in accordance with the *sharī'ah*. If the ruler violates these principles, he calls it *siyāsah ẓālimah* or tyrannical administration.[18]

The existence of two cooperating spheres does not mean that the ruler is free to develop the law in the flexible sphere as it suits his fancy. There is a clear methodology laid down by the jurists, a methodology that the ruler is required to adopt. Further, the idea of two spheres of law is merely conceptual, it does not imply that there is a separation or division within the legal system itself. Indeed, the law must operate as a single body of rules, based on the *sharī'ah*, in one seamless operation.

As soon as we make the assumption that there are two distinguishable conceptual spheres of the law, one permanent and the other changing with the times, we discover a powerful tool with which to analyze the structure of Islamic law. Islamic law begins to appear in a different light; it changes into a system that has not only been effective in the past, but can function with a little effort even today. In fact, many of the views and opinions of the earlier jurists assume a new meaning.

All this may be true, but is there any evidence suggesting the existence of two cooperating spheres of Islamic law? The answer is

[18]See Ṭarābulusī, *Mu'īn al-Ḥukkām* (Būlāq, n.d.) 1.

"Yes." The evidence is to be found in the nature and structure of Islamic law itself. An explanation will be provided later in this book, at the end of part one. It may be mentioned though that while this explanation has been woven into the traditional pattern followed in this book, it would be possible for those who are not interested in this explanation to skip this material, if they so desire. It is felt, however, that this is an important question and needs to be analyzed and answered.

2.4. The problem of rights

Another point that has not been misconceived so much as it has been neglected by modern writers is the question of rights in Islamic law. Islamic law revolves around a system of rights. These rights are discussed by some scholars today, but not in a way Muslim jurists, at least the Ḥanafī jurists, intended them to be understood. The distinction between the rights of Allāh and the rights of the community or the state is of crucial significance in Islamic law. Modern writers have never made this distinction. Further, an understanding of the detailed system of rights upon which the Islamic legal system is structured is a prerequisite to the study of Islamic law. The different kinds of rights operating in Islamic law will be explained in detail in this book. The question of human rights in Islam, however, requires detailed explanation, which we intend to provide in another work on the philosophy of Islamic law.

2.5. Disciplines related to *uṣūl al-fiqh*

There are certain disciplines that are intertwined with *uṣūl al-fiqh*. When we consider these disciplines in the sense of Islamic legal theory, however, it is not possible to separate these subjects, and they have to be considered a part of *uṣūl al-fiqh*. These subjects are *al-ashbāh wa al-naẓā'ir* and *al-furūq*. The former teaches us how general principles are formulated in Islamic law. The credit for initiating this field as a systematic discipline goes to the Shāfi'ī jurist al-Juwaynī (d. 478 A.H.), but the discipline itself is much older and was practiced by the Ḥanafī jurists, because general principles form an essential part of their legal theory, as we will have occasion to show in the second part of this book that deals with legal theories.

The second discipline, known as *al-furūq*, is the art of distinguishing cases. It is an art with which the modern judge trained in the

common law is all too familiar. The credit for this goes to the Mālikī jurist al-Qarāfī, but again this does not mean that he is the author of the field itself, just because he wrote a book on the subject.

There is a tendency among modern writers to associate an entire field with a particular author of a book. It is assumed that just because there was no book on a subject the discipline itself did not exist. This tendency is to be guarded against, as it tends to distort legal history. The classic case is that of Islamic legal theory itself. The entire discipline is attributed by some to the great jurist al-Shāfi'ī because he wrote the first book on the subject. Does that mean that there was no legal theory in Islam before *al-Risālah* appeared on the scene? It would be incorrect to assume that there was none. As long as Islamic law existed before him, there had to be a legal theory. True, this theory would be somewhat different from the one expounded by al-Shāfi'ī, but it did exist nevertheless.

The purpose is to emphasize that splitting up disciplines into too many sub-branches tends to conceal the global picture, a picture that is extremely important for understanding a legal system as complex as the Islamic. This brings us to the observation that Islamic law is indeed complex, and its legal theory is even more difficult to understand. It takes years of study to understand its basics. It is for this reason that an effort has been made to present the material in a simple form. This implies that some of the finer details may be missing and the interested reader will have to work on his own to discover them.

Chapter 3

The Meaning of *Uṣūl al-Fiqh*

The meaning of Islamic legal theory or *uṣūl al-fiqh* that emerges from definitions provided by Muslim jurists applies primarily to the fixed part of the law. The same definitions, however, may be widened slightly to apply to the flexible part as well. The focus of jurists, as has been stated earlier, was on the part of the law that was stated explicitly in the texts of the Qur'ān and the *Sunnah*, or could be derived through a direct implication, which was either literal or based on a strict method of analogy called *qiyās* as well as on related methods like *istiḥsān*. Anything beyond this fell within the domain of the state or the ruler, who was required by Islamic law to be a *mujtahid*, a qualified and distinguished jurist. This qualification could also be enjoyed by delegation. Thus, there can be no doubt that the first four Caliphs were full *mujtahids*. Some later rulers have also been considered by the jurists to be *mujtahids*. Today such a qualification will obviously be enjoyed by delegation.

To explain the matter in a little more detail, we may say that the focus of Muslim jurists dealing with the fixed part of the law was more on the specific evidences in the Qur'ān and the *Sunnah*, while the sources for the state were the broader principles emerging from these evidences. Thus, the Muslim jurist was occupied more with the *juz'ī* or the specific evidence, while the state was to use the *kullī* or the general evidence. Having said this, we may note that both the jurist and the state could use either type of evidence, the specific as well as the general without restriction. Because our purpose here is only to identify the broader trends, we may assume for the time being that the Muslim jurist focused on the *juz'ī*, while the *imām*

employed the *kullī* for the derivation of the law. It is with this in mind that we may approach the definition of *uṣūl al-fiqh* provided by the jurists.

3.1. *Uṣūl al-fiqh* defined

The meaning of *uṣūl al-fiqh* is explained by the jurists in great detail. They split up the term into two parts and define or explain these components separately. Once the constituent parts are defined, they combine the two parts to arrive at the definition. It would certainly be easier to skip this definition and explain the meaning of the discipline in simple terms, but we feel that the reader is entitled to understand the language of the jurists directly. We will, therefore, proceed with the definition provided by jurists. Once this has been done, we will provide a simpler explanation.

The mode of definition used by the *fuqahā'* (plural of *faqīh*: jurist) is what we call genus-species definition, a method that originated with Plato and Aristotle.[1] It is not considered very effective in modern times, but to understand what the *fuqahā'* said we must use the method they wanted us to. This method, which is one of the most common, consists in the selection of a word called *definiendum*. This word is first set into its genus (class) and then distinguished from the other members of the class. Most definitions formulated by Muslim jurists are based on this pattern.

The term *uṣūl al-fiqh* is composed of two terms: *uṣūl* (pl. of *aṣl*) and *fiqh*. The jurists usually define the term *fiqh* first.

3.1.1. The meaning of *fiqh*

The literal meaning of *fiqh*

The term *fiqh* is used in the literal sense to mean "understanding," and in this sense the words *fiqh* and *fahm* are synonymous. It implies an understanding of Islam in a general way or what a prudent person is likely to conclude from obvious evidences.[2] The term *'ilm* (knowledge) also gives the same meaning, and in the time of the Prophet

[1] There is an elementary distinction in philosophy between the definition of a word and that of an entity. Definitions of words are called nominal definition, while those of entities, that is, concepts, objects etc. are called real definitions.

[2] The word has been used in the Qur'ān on several occasions:

فَمَالِ هَٰؤُلَآءِ ٱلْقَوْمِ لَا يَكَادُونَ يَفْقَهُونَ حَدِيثًا

What hath come to these people that they fail to understand a single fact. [Qur'ān 4 : 78];

there appears to be no difference in the two terms. Later, as sophistication crept in, the term *'ilm* came to be applied in a narrow sense to mean knowledge that comes through reports, that is, traditions: *hadīth* and *āthār*. The term *fiqh*, on the other hand, came to be used exclusively for a knowledge of the law. Thus the terms *'ilm* and *fiqh* were separated when specialization in law and tradition came into existence toward the end of the first century of Hijrah.[3]

Similarly, the terms *kalām* and *fiqh* were not separated till the time of al-Ma'mūn (d. 218 A.H.). *Fiqh* till such time embraced both theological problems and legal issues.[4] Abū Ḥanīfah (d. 150 A.H.) defined *fiqh* as: مَعرِفَةُ النَّفسِ مَا لَهَا وَ مَا عَلَيهَا or "a person's knowledge of his rights and obligations."[5] Abū Ḥanīfah is said to have applied the term *al-fiqh al-akbar* (the greater understanding) to *'ilm al-kalām*,

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لَهُمْ قُلُوبٌ لَا يَفْقَهُونَ بِهَا

They have hearts wherewith they understand not. [Qur'ān 7 : 179]

The same meaning is reflected in the words of the Prophet:

من يرد الله به خيرًا يفقهه في الدين

He for whom Allah wills His blessings is granted the understanding of *dīn*. [*Ṣaḥīḥ Muslim: Kitāb al-Amārah*]

[3] *See, e.g.*, Ahmad Hasan, *The Early Development of Islamic Jurisprudence* (Islamabad, 1970) 4. "It is to be noted that *'ilm* from the very beginning carried the sense of knowledge that came through an authority—it may be God or the Prophet." Ibid. 5.

[4] Ibid. 3.

[5] *See* Ṣadr al-Sharī'ah (d. 747 A.H.), *al-Tawḍīḥ fī Ḥall Jawāmid al-Tanqīḥ* (Karachi, 1979) 22. Explaining the definition given by Abū Ḥanīfah he says that it includes three things:

1. knowledge of the tenets of faith;
2. knowledge of ethics and mysticism (*taṣawwuf*); and
3. knowledge pertaining to acts.

The first is covered by *'ilm al-kalām*, the second by ethics and mysticism, and the third by *fiqh*. Ibid. 25. Thus, he says, if you wish to confine the definition to *fiqh* alone, that is, *al-fiqh al-aṣghar*, you must add at the end of the definition the word *'amalan*. Ibid. The definition would then become:

مَعرِفَةُ النَّفسِ مَا لَهَا وَ مَا عَلَيهَا [عَمَلًا]

A person's knowledge of his rights and obligations [with respect to his acts]. Ibid. 22.

implying thereby that *fiqh* pertaining to acts is *al-fiqh al-aṣghar*.[6] The subject of *kalām* was introduced by the Mu'tazilah during the time of al-Ma'mūn and the term *fiqh* came to be restricted to the corpus of Islamic law. It is in this sense that we understand the term *fiqh* as will be obvious from the definition given below.

The technical meaning of *fiqh*

It has been explained above that the word *fiqh* was used in the early days in a comprehensive way to include the tenets of Islam, its ethics, Islamic law, and the questions relating to the spiritual aspects of things for which the term *taṣawwuf* subsequently came into use. In its technical sense, however, it was restricted to Islamic law alone. To highlight such an application the term *fiqh* was defined as follows:

العلم بالاحكام الشرعيّة العمليّة المكتسبة من أدلّتها التفصيليّة

This may translated into English as:

> The knowledge of the *shar'ī aḥkām* (legal rules), pertaining to conduct, that have been derived from their specific evidences.[7]

3.1.2. Analysis of the definition

In order to comprehend fully the exact meaning of the term *fiqh* an analysis of the above definition is required. Each word used is intended to affect the required meaning and to sharpen our understanding of the term defined.

The first segment "*fiqh* is knowledge" identifies the genus we are dealing with. The use of the term "*al-'ilm*" brings into focus the entire field of knowledge, whatever its source or origin. If the definition were restricted to this segment alone, *fiqh* would mean all and any

[6] Abū Ḥanīfah is attributed to have written a book entitled *al-Fiqh al-Akbar* dealing with the tenets of faith. This is a very small book comprising a few pages. A commentary on this book was written by Muḥammad ibn Muḥammad Māturīdī (d. 944 or 5), *Sharḥ al-Fiqh al-Akbar* (Ṣaydā: Manshūrāt al-Maktabah al-'Aṣrīyah, [198-]). It is also said that Abū Ḥanīfah wrote a book on *uṣūl al-fiqh*, but this has not reached us.

[7] The term *adillah tafṣīlīyah* has been intentionally translated here to mean specific evidences rather than the ususal translation—"detailed proofs,"— which is likely to confuse the reader. It is the specific evidences that are referred to in the definition, as distinguished from the general evidences or the *adillah ijmālīyah*.

kind of knowledge. In this sense it would conform with its literal meaning. This wide meaning, however, is qualified by the use of the word "*aḥkām*," which exclude from the definition of *fiqh* all kinds of knowledge that do not pertain to *aḥkām* or rules. This is further qualified by the term "*shar'ī*" and the meaning of *fiqh* is confined to the knowledge of the *shar'ī aḥkām*. Here we must distinguish between the *shar'ī aḥkām* and the *ghayr shar'ī aḥkām*, that is between legal rules and rules that do not pertain to the law.[8] The *ghayr shar'ī aḥkām* are of three types:

1. Those that are rational, like 2+2=4, or the rule that the sum is greater than its parts;
2. Those that are perceived by the senses, like fire burns or wood floats on water; and
3. Those that are discovered through experience, like aspirin cures headache.

All these are not *shar'ī aḥkām*. In other words, they are the *ghayr shar'ī aḥkām* and do not form part of the *sharī'ah*,[9] or *fiqh* for that matter.

We have noticed that the first word used to define *fiqh* is *al-'ilm* and it conveys to us that "*fiqh* is knowledge." The second word is *al-aḥkām* which restricts this knowledge to that of rules, to the exclusion of all other kinds of knowledge. The next word is *al-shar'iyah*. This further narrows down the meaning of *fiqh* to that of legal rules and excludes the knowledge of all rules not falling within the ambit of

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[8] The term *ghayr shar'ī* does not necessarily mean illegal, as it might sometimes imply in Urdu, but those rules which do not fall within the ambit of *fiqh* or *sharī'ah*.

[9] Modern Muslim thinkers who consider that there are disciplines, like mathematics, physics and chemistry, that can be cast into the Islamic mold and called "Islamic" may have an observation to make here. The classical jurists considered these disciplines, as is obvious from the definition, to be outside the pale of the *sharī'ah*. This would not mean that they are not to be pursued. The question whether such disciplines can be called Islamic or flourish within the matrix of the *sharī'ah* is not relevant here. This definition will, therefore, not be used here to pass a judgment on the project of Islamization of knowledge being pursued at some institutions. We may, however, quote al-Ghazālī here. He says: "Know that the sciences are divided into rational, like medicine, arithmetic, and geometry, and these do not concern us here, and into religious, like *kalām*, *fiqh*, its *uṣūl*, *'ilm al-ḥadīth*, *tafsīr*, and the knowledge of the *bāṭin*, that is, of the *qalb*." Al-Ghazālī, *al-Mustaṣfā*, i, 5.

law. *Fiqh* then is the knowledge of the *shar'ī aḥkām*. In order to proceed further, we must understand what we mean by the term *shar'ī aḥkām*. *Shar'ī aḥkām* are of two types:

1. the *aḥkām* relating to belief (*i'tiqād*), like the existence of Allāh, His oneness, the truth of the mission of the Prophet, belief in the Day of Judgment, and so on;
2. the *aḥkām* relating to acts (*a'māl*). These are divisible into three kinds:
   - those which pertain to physical acts, like the acts of prayer (*ṣalāh*), or those constituting wilful homicide (*qatl 'amd*);
   - those which take place within the *qalb*, like intention, love, hate, or jealousy;
   - those that relate to speech, like recitation during prayers, or offer and acceptance in a contract.

The word used next in our definition is *al-'amaliyah*, which qualifies the *aḥkām* to mean those that pertain to acts. Thus, knowledge of the *aḥkām* with respect to belief is excluded. This knowledge is confined to the discipline known as *'ilm al-kalām*. *Fiqh*, then, is *knowledge of the shar'ī aḥkām that affect conduct*. This includes physical acts, acts of the *qalb*, and acts arising out of the spoken word.[10]

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[10]The knowledge of the *shar'ī aḥkām* (legal rules) in fact relates to the *khiṭāb* (communication) of Allāh. The *ḥukm* (rule) from this aspect is divisible into two kinds:

1. that which does not depend on the *sharī'ah* for its attainment, like belief in God, or belief in the truth of the mission of the Prophet;
2. that which is dependent on the *sharī'ah* for its content.
   This is further divisible into two kinds:
   - that which is *naẓarī* or theoretical like the justification that *ijmā'* is a *ḥujjah* (proof) or *qiyās* is a *ḥujjah*;
   - that which relates to *'amal* (conduct).

Here again we may notice that the emphasis is on *'amal* or conduct, and on the rules related to it. The important point to notice is that the discussion of the justification of sources of law like *ijmā'* and *qiyās*, whether they are a valid proof or *ḥujjah*, takes ample space in modern books on *uṣūl al-fiqh*, but such knowledge is considered theoretical or *naẓarī* by the jurists. In this sense, once a source is accepted as valid proof, it does not affect the discipline of applied *uṣūl al-fiqh*, which is being emphasized in this book.

The use of the word *al-'amaliyah* will confine the definition to the knowledge of *'amali* rules alone.

The definition is further qualified by the use of the word *al-muktasabah*, which means derived or acquired. The employment of this word excludes from the definition of *fiqh* the following types of knowledge of the *shar'i aḥkām*:

1. knowledge of these *aḥkām* that rests with Allāh Almighty;
2. knowledge of the *aḥkām* granted to the Prophet;[11]
3. knowledge of the *aḥkām* granted to Jibrīl (Gabriel).

These three types of knowledge are not acquired and, therefore, are not included in the definition of *fiqh*. On the other hand, there are two types of knowledge that are acquired: the knowledge of the jurist (*faqīh*) and the knowledge of the layman (*muqallid*).

At this stage the definition is qualified further with the term *adillah tafṣīliyah* or specific evidences. The specific evidences are primarily individual texts, whether of the Qur'ān or of the *Sunnah*. The definition, stated above, still includes two kinds of derived or acquired knowledge: the acquired knowledge of the *faqīh* and the acquired knowledge of the *muqallid*. The use of the term *adillah tafṣīliyah* excludes, from the definition of *fiqh*, the knowledge of the *muqallid*. The reason is that the layman does not acquire his knowledge of *fiqh* directly from specific evidences in the Qur'ān and *Sunnah*, as does the *faqīh*; the *muqallid* acquires his knowledge of *fiqh* from the jurist.

The defintition of *fiqh* explained above began by first encompassing all knowledge within it, and then systematically excluded those types of knowledge that do not form part of *fiqh*. The final form of the definition declares *fiqh* to be that knowledge of the rules of conduct that has been derived by the jurist from specific evidences in the Qur'ān and the *Sunnah*.

It would be helpful for the reader if a few distinctions are drawn. First, the definition indicates that there is a difference between the meaning of the terms *shari'ah* and *fiqh*. We often find that these two terms are used interchangeably. This definition, however, indicates that the term *shari'ah* has a wider meaning than *fiqh*. The term

[11] The jurists discuss a situation where the Prophet may be considered to have exercised *ijtihād*. This, in their view, may affect the binding force of such a ruling. It appears to be an idle distinction, as it would be very difficult to separate it from the *Sunnah*.

sharī'ah includes both *fiqh* as well as the knowledge of the tenets of faith, that is, the *'aqā'id*. The real distinction between *sharī'ah* and *fiqh*, however, is that *sharī'ah* is the law itself, while *fiqh* is a knowledge of that law—its jurisprudence.

There appears to be some distinction in later times between the terms *mujtahid* and *faqīh*. Our definition of *fiqh* does not make this distinction, because both terms are applied to mean the jurist who derives the *aḥkām* directly from specific evidences. In later times, the term *faqīh* came to be applied to the jurist who derived his knowledge from the manuals of *fiqh*, which contained the opinions of the *mujtahids*. Such a person does acquire the knowledge of the previously derived *aḥkām*, but according to the definition he would be classified as a *muqallid*.

Does this definition of *fiqh* apply to the fixed sphere of law alone, or does it cover both the fixed and the flexible spheres? In other words, does the definition apply exclusively to the activity of the jurist, who derives the law from specific evidences, or does it also cover the legislative activity of the state, when the state may be relying more on general principles of Islamic law, especially when the general principles employed are derived by the jurist or judge and are not stated explicitly in the texts? We have stated above that the fixed sphere of the law has grown out of, or has been derived from, the specific evidences. The definition talks about the specific evidences alone. The application of this definition will become clearer after we have analyzed the meaning of the term *aṣl*, the plural of *uṣūl*. We will now turn to this.

3.1.3. *Uṣūl al-fiqh*

The meaning of *uṣūl al-fiqh*, as we have said, is arrived at by understanding the meanings of *uṣūl* and *fiqh* separately and then combining them. The meaning of *fiqh* has been explained above and we now need to know the meaning of *uṣūl*, which is the plural of *aṣl*.

The meaning of *aṣl*

The literal meaning of the term *aṣl* is "something from which another thing originates." Thus, the origin of a thing is its *aṣl*. That is the reason for translating the word *aṣl* as "root." The term *aṣl* also means "something upon which another thing is constructed," and here it gives the meaning of "foundation." In certain cases, the term *aṣl* is used in the sense of the Arabic word "*maṣdar*," which means

"source." All these are the literal applications of the word *aṣl*. For purposes of Islamic law, however, we are interested in the technical use of the term.

There are several technical applications of the word *aṣl* in Islamic law. Some of these are listed below:

1. The word *aṣl* is used to mean *dalīl*. The word *dalīl* was applied to mean a guide leading a caravan, or scout finding the trail. In this sense, a directory, like a telephone directory, may be called a *dalīl*, because it leads us to a number or an address. In Islamic law, the word *dalīl* is used in two ways: *dalīl tafṣīlī* and *dalīl kullī* or *dalīl ijmālī*. The former, that is, *dalīl tafṣīlī* is like an individual verse of the Qur'ān or an individual *Sunnah* in a *ḥadīth*. We may refer to it as a "specific evidence," though it is sometimes translated as "detailed proof." For example, the verse, "Verily prayers are enjoined on believers at stated times,"[12] is a specific evidence in the Qur'ān that points to a *ḥukm* of Allah. As compared to this, the *dalīl ijmālī* or *kullī* is a general evidence, because it contains within it a large number of specific evidences. The Qur'ān is a general evidence: it contains a large number of specific verses within it. So is the *Sunnah*, which contains within it a large number of individual *sunan*. This use of the term *dalīl* conforms with the meaning of "source." *Uṣūl al-fiqh* is a discipline that teaches us reasoning from general evidences, the sources of Islamic law. It tells us what general evidences validly indicate or point to the *aḥkām* of Allāh. The discipline, therefore, teaches us how *ijmā'* (consensus of opinion), *qiyās* (analogy), and others are general evidences and validly lead to the *aḥkām*. The discipline that deals with the specific evidence, or reasoning from it, is known as the science of *khilāf*. It tells us how individual jurists have based their reasoning on specific evidences. In this sense, we may refer to *uṣūl al-fiqh* as theoretical *uṣūl* and the science of *khilāf* as applied *uṣūl*.

2. The word *aṣl* is used to indicate the foundation upon which analogy is constructed. Thus, *khamr* is an *aṣl* or basis for the prohibition of the *nabīdh* (beverage) of dates, as the common cause (*'illah*) of intoxication is found in both, but is extended from *khamr*, which is the *aṣl*.

[12] Qur'ān 4 : 103

3. *Aṣl* is sometimes used in the sense of the original rule. Thus, the maxim says:

الأصل في الأشياء الإباحة

The original rule for all things is permissibility.

The principle implies that all things are permissible, unless specifically prohibited by the *sharī'ah*. The meaning of this principle is explained in some detail in the next chapter. This principle does relate to the methodology of the jurist, but is not part of *uṣūl al-fiqh*.

4. Finally, the term *aṣl* is used in the meaning of a general principle. General principles are of two kinds. Those that govern the law and those that govern interpretation. The former are sometimes called *qawā'id fiqhīyah* or general principles of *fiqh*, while the latter are referred to as *qawā'id uṣūlīyah*. It is these latter principles that are the subject matter of *uṣūl al-fiqh*. We will examine these principles in a little more detail.

The *qawā'id uṣūlīyah*

The term *uṣūl* is generally understood to mean "sources," but for the jurist it implies "a body of principles," which he uses to interpret the texts. The use of the word "source" in the Western sense of the term conceals this important point. The principles of interpretation with which we are concerned here are formulated by the Muslim jurists in the form of general propositions whose major premiss serves as the principle. Such a principle is referred to as a *qā'idah uṣūliyah*. While formulating this principle the jurist tries to ensure that the intention of the Lawgiver is supreme. Thus, for example, a proposition may be stated as follows:

> The *aḥkām* of Allāh are to be found in the Qur'ān. The Qur'ān is a source of law. Thus, each time a *ḥukm* is found in the Qur'ān it is proved as the *ḥukm* of Allāh.[13]

The principle that emerges, and which is usually stated, is that *the Qur'ān is a source of law*. The emphasis, however, is always on the

[13] Ṣadr al-Sharī'ah, *al-Tawḍīḥ*, i, 45.

last sentence; namely, *each time a ḥukm is found in the Qur'ān it is proved as the ḥukm of Allāh.* The same is the case with the *Sunnah* as well as *ijmā'*; when it is said that they are sources of law, the emphasis is identical. The same emphasis is applied by the Sunni schools of law when they are formulating a principle for *qiyās.* Thus, when the jurist maintains that analogy (*qiyās*) is a source of law, the emphasis will always be on the fact that "each time analogy is successfully used to discover the law (from the Qur'ān and *Sunnah*) a *ḥukm* of Allāh is discovered or proved."[14] This is so as *qiyās* is merely a method of discovering a law laid down in the Qur'ān and the *Sunnah*, and the law is actually being proved from the two primary sources.

The jurist, in this way, arrives at four fundamental principles of interpretation related to the four acceptable sources of the law. These are what we really mean by the term *adillah ijmāliyah* referred to above, that is, comprehensive sources that contain within them a large number of detailed individual evidences, the *adillah tafṣīliyah.* These four principles are not the only principles used in this discipline. Each school formulates principles for the additional sources that it accepts and acts upon. The emphasis is the same as for the first four sources with respect to the resulting rule being the *ḥukm* of Allāh. This body of rules or principles is known as *uṣūl.* These, however, are only part of a larger whole. A large number of such principles are derived from the rules of literal interpretation that are also part of *uṣūl*, a subject that we shall discuss in the second part of this book in a little more detail.

3.1.4. The final definition

When the meaning of *qawā'id uṣūliyah* is combined with the meaning of *fiqh* explained earlier, we arrive at the definition of *uṣūl al-fiqh.* This is stated very simply as:

هي القواعد التي يتوصل بها المجتهد الى الأحكام الشرعية العملية من الأدلة التفصيلية

> They are the principles by the use of which the *mujtahid* arrives at the legal rules through the specific evidences.

This explains the meaning of *uṣūl al-fiqh* as it is elaborated by Muslim jurists. It will be helpful if we compare this meaning with that of legal theory in secular or positive law, and try to relate certain ideas in that discipline to those in *uṣūl al-fiqh.*

[14] Ibid.

3.2. Comparison with legal theory

We have seen above that one of the major questions asked in general jurisprudence or in legal theory is: How do judges discover and apply the law? This gives rise to what are termed as theories of adjudication in law. Each legal philosopher may try to give his own idea of how the mind of the judge works and operates upon the legal materials available to him. Thus, Hart may have one view, the Realists another, and Ronald Dworkin another. In Islamic law too the situation is somewhat similar. The major question asked is: How do Muslim jurists discover the law from the Qur'ān and *Sunnah* and apply it to the set of facts facing them? There are different views in Islamic law in response to this question. These, however, have been grouped together in a more systematic form, and are found today in the form of schools of law. Each school represents a unique answer to the question posed. Each school has its own view of how the Muslim jurist discovers and applies the law. Each school, therefore, presents its own theory of law.

There is a significant difference, however, between questions posed by Islamic legal theory and secular legal theory. The difference holds the key to understanding some of the vital issues in Islamic legal history, and we will have occasion to examine this in part two of this book. The difference is that Western legal theory focuses on what the judge actually does, while Islamic legal theory focuses on what the judge should do. Islamic legal theory, therefore, poses the question: How should the judge discover and apply the law? In other words, a knowledge of legal theory is a prerequisite in Islam for the ability to derive the law, while it is not so in secular or postive law.[15] It may be pointed out, however, that treating legal theory as a prerequisite became the rule in Islamic law only when the great Muslim jurist al-Shāfi'ī appeared on the scene. Before him, the question was the same as that posed by Western legal theory, that is, how does a judge discover and apply the law? Perhaps, it is still the same for the Ḥanafī school.

[15]Stated simply, it means one must know *uṣūl al-fiqh* before attempting to undertake *ijtihād*.

Some Western legal philosophers are not content with answering this question alone. They ask further questions: What is the nature of law? Why do we obey the law? What is the total concept of law? Philosophers such as H.L.A. Hart have focused mainly on these questions. Some of the Muslim jurists, though not all, have also answered these questions. In doing so they discuss the concept of Islamic law. It is this concept that we will be studying in the first part. The second part is devoted to answering the question: How do Muslim jurists discover and apply the law?

We may now turn to the examination of the *ḥukm shar'ī*, which means a rule of Islamic law, but which is referred to in this book as the concept of Islamic law, because understanding it in its various manifestations means understanding the concept of Islamic law.

Part I

The Concept of Islamic Law

Chapter 4

Law as the *Ḥukm* of Allāh

The source of all laws in Islam is Allāh and Allāh alone. The verse of the Qur'ān, "The *ḥukm* belongs to Allāh alone,"[1] is often cited in support of this. This basic rule determines the character of Islamic law and gives direction to all interpretation and *ijtihād*. It is Allāh's laws alone that are acceptable to the Muslim and no other sovereign or temporal authority can command his obedience. This is the essence of social contract within a Muslim community. Each Muslim agrees to be a Muslim not only because he believes in the existence of one God and the truth of the mission of His Messenger, but also because the laws are prescribed by the Wise and Just Lord, and these laws grant him security from oppression and ensure justice and fairplay in all dealings. A Muslim surrenders his will to Islam so that his life may be regulated in accordance with the *ḥukm* of Allāh.

How do we reconcile submission to the will of Allāh on the one hand, and the authority of the modern states run on the basis of constitutions, ostensibly subservient to the will of the people, on the other? Does the constitution serve as the fundamental norm validating all laws and requiring obedience to them, or is it the Qur'ān? If the purpose of the *sharī'ah* is to lay down laws in the interest (*maṣlaḥah*) of Man, then, do human beings have the right to make laws in accordance with whatever they deem to be their interest? What role do human reason and natural law play in the framing of laws in an Islamic state? If it is the *sharī'ah* alone that provides guidance for the framing of laws, then, what about the countless new situations over which the *sharī'ah* is silent? Finally, what is the ex-

[1] Qur'ān 6:57

tent to which the *sharī'ah* is to regulate our legal system, considering the fact that it is a "complete code of life"?

We shall discuss these questions very briefly, and attempt to understand the position taken by Islamic law, or its jurists, on these issues. A final answer may not be indicated for each of these questions.

4.1. The grundnorm

The fact that Allāh alone is the source of all laws is in itself an indication of the fundamental norm of the Islamic legal system. The fundamental norm is repeated several times each day by every Muslim. It is contained in the declaration: "There is no god, but Allāh, and Muḥammad is the Messenger of Allāh." As the Muslim is ready to accept the laws of Allāh, he will accept only those laws that were revealed through His Messenger. The revelation granted to the Messenger is in the form of the Qur'ān, and the Qur'ān itself declares the *Sunnah* of the Messenger of Allāh to be a source of laws, or, as is maintained by some, the *Sunnah* is itself a form of revelation. Starting from the other end, the Muslim may say, "I am ready to obey such and such law as it has been communicated to me by a qualified jurist. I follow the opinion of the jurist as it is in conformity with the sources of Islamic law. I obey a law based on the sources as they are the sources revealed to Muḥammad. I obey Muḥammad for he is the Messenger of Allāh, and I believe in Allāh." It is obvious that the public acceptance of this declaration makes the law of Allāh binding upon the person. Inner intention is of no consequence for the imposition of the obligation after such public acceptance.

This norm is further extended by the words of God, "O ye who believe! Obey Allah, and obey the Messenger, and the *ūli'l-amr* among you; and if ye have a dispute in ANY matter, refer it to Allāh and the Messenger, if ye are (in truth) believers in Allāh and the Last Day."[2] According to the jurists, the "*ūli'l-amr*" are those who have the qualification and ability to interpret the law, for it is they who can help the disputants to refer the dispute to Allāh and the Messenger, that is, to the Qur'ān and *Sunnah*. Even if the verse refers to "those in authority" or the rulers, the first qualification for the *imām* or leader is that he be a *mujtahid*. The word "ANY" indicates that this applies to all kinds of disputes, or to laws covering each and every activity.

[2]Qur'ān 4:59 Pickthall's translation with a slight change.

It is, therefore, not enough to apply the laws of Allāh in the areas of marriage, divorce, and inheritance, and call the state an Islamic state.

A fundamental question that arises from any discussion of the basic norm relates to the validation of the law. Who is to decide that a new law has been made in accordance with the principles of Islamic law and is fit to be termed as "Islamic law"? Calling any provision of the law as "Islamic" is a serious matter. Each provision of the law declared as Islamic is considered, by the Islamic legal system and its jurists, to be the *ḥukm* of Allah. All laws derived by the *fuqahā'* from the Qur'ān and the *Sunnah*, whether directly or through analogy (*qiyās*), are assigned this status. Are the commands of the ruler to be assigned such a status in a modern Islamic state? Will the laws passed by the legislature be assigned such a status? In modern states that have written constitutions a law passed by the legislature is valid if it has been passed through a prescribed procedure and conforms with the provisions of the constitution. All laws not conforming with the constitution are declared unconstitutional, by the courts of law, and hence not valid. The constitution, thus, serves as the basic norm, a *grundnorm*, that lends validity to new laws. Most Muslim states now have written constitutions. Surely, such constitutions in themselves do not serve as the fundamental norm validating the law as Islamic.

In Pakistan, the basic norm described above stands translated in the form of the Objectives Resolution. It was presented before the Constitutent Assembly on March 7, 1949, and was adopted on March 12, 1949. In Asma Jilani's case, PLD 1972 SC 139, Chief Justice Hamoodur Rahman observed:

> In any event, if a grundnorm is necessary for us, I do not have to look to the Western legal theorists to discover one. Our own grundnorm is enshrined in our doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by Him is a sacred trust. This is an immutable and unalterable norm which was clearly accepted in the Objectives Resolution.

In *Zia-ur-Rahman v. The State*, PLD 1972 Lah. 382, it was deemed to be a supra-constitutional instrument, but in *State v. Zia-ur-Rahman*, it was held that it is not a supra-constitutional instrument; rather it enjoys the status of a preamble, having been incorporated as such, The Objectives Resolution was inserted into the

Constitution of 1973 as Article 2A by President's Order No. 14 of 1985. There were suggestions after this that as the Objectives Resolution had become part of the Constitution (*vide* Article 2A), the Resolution had acquired the status of a supra-constitutional document. The suggestion in the words of the Court was: "Resultantly, any of the existing provisions of the Constitution which conflicts with its terms and is inconsistent or repugnant to its principles and provisions has become inoperative and of no legal effect and can be so declared by the Courts."[3] This question finally came up before the Supreme Court in Hakim Khan v. Government of Pakistan. Chief Justice Nasim Hasan Shah held:

> Accordingly, now if any question is raised in connection with the validity of any existing provision of the Constitution on the ground that it transgresses the limits prescribed by Allah Almighty (within which His people were competent to make laws) *such a question can only be resolved by the Majlis-i-Shoora (Parliament)*, which can, if the plea is well founded, take the necessary remedial action by making suitable amendments in the impugned provision in order to bring it within the limits prescribed by Almighty Allah.[4]

The question of constitutional provisions having been settled, it still remains to be seen as to who is to decide whether a provision of the law, other than a constitutional provision, is repugnant to the Qur'ān and the *Sunnah*? The institutions that traditionally perform such a function are the courts of law, and that is what appears from the judgements mentioned above. This takes us into the discussion of democracy and majoritarian rule.

Laws are passed in democracies according to the wishes of the people, or better still, the wishes of the majority. If such laws are found to be incompatible with the injunctions of the Qur'ān and the *Sunnah*, they can be struck down by the courts, as the courts are acting within the mandate granted to them by the constitution. If this is not acceptable to the people they can amend the constitution and pass the laws they desire. In the Islamic legal system, it is obvious that the people do not have the power to change the Qur'ān or the *Sunnah*, and they will have to bow before the courts and their interpretation of the Qur'ān and the *Sunnah*. Assuming for a minute that

[3] Hakim Khan v. Government of Pakistan, PLD 1992 SC 559, 612.

[4] PLD 1992 SC 621 (Emphasis added).

the people decide to pass a law that is incompatible with the Qur'ān and the *Sunnah*, and the courts strike it down, would this process be counter-majoritarian? Is democracy incompatible with Islamic law?

The question that flows out naturally from the previous discussion concerns the appropriate form of government for an Islamic state, whether it is democracy, monarchy, dictatorship, or some other method to be developed in the future. Muslims continue to debate this question. It is considered to be the domain of political theorists, but for the *fuqahā'* it remained a legal question for centuries.

The Islamic state began, as is well known, in the shape of a *khilāfah* (caliphate). The institution existed in its proper ideal form during the period of the first four caliphs and thereafter changed into some kind of monarchy, usually termed as *mulk*. It retained the name of *khilāfah* and continued to be accepted as such by the jurists for several centuries. Later, with the weakening of government at the center, the local governors, or *amirs*, started usurping power, and sultanates started appearing at different times in different places. In the beginning, the caliph, in the interest of the unity of the Muslim state, ratified the assumption of power by the *sulṭān*. This also had the effect, in terms of law, of providing a legal cover to the illegal acts of the *sulṭāns* and of the legitimization of their rule. Throughout this period, the jurists clung to the idea of a unifying caliphate, deeming it essential for the legitimacy of government and the validity of legal transactions.[5] When the caliphate weakened further and things got completely out of hand, the jurists began to acknowledge "power" as a justification for a legally valid rule by the sultans. Finally, the caliphate was put to the sword by the Mongol hordes.

[5]This is an important point and needs to be emphasized. Many jurists clung to the idea of the caliphate for a long time, even when in practice it had lost all power. The implication in the writings of these jurists was that the *khilāfah* was the only form of government that could be linked to the time of the first four caliphs, a time that provides legal precedents for later times. In other words, they insisted that a form of government that was based on an earlier precedent must be maintained. This would make the government legal. Questions of legitimacy were, therefore, not important in themselves, but because of the validity of legal transactions. In their view, if the government was not legal, that is, not a *khilāfah*, the officials appointed by the ruler, including the *qāḍī*, would have no authority, and all transactions validated by these officials would become null and void. For example, all contracts of marriage, which are validated by the *qāḍī* or his delegated authority would be void, and the people would be living in sin. This was stated by al-Ghazālī, while justifying the concept of *shawkah* (power). See e.g., al-Ghazālī *al-Iqtiṣād fī al-I'tiqād* (Ankara, 1962) 234-41.

With the disappearance of the caliphate, the jurists were forced to come up with a new theory of constitutional government, which declared the *sharī'ah* to be supreme, and forms of government to be of secondary importance. This was a contribution made by Ibn Taymiyah. The caliphate kept on raising its head in different forms after this period, but it never enjoyed the same authority or legal acceptance as the earlier caliphate. It was the Turks who finally abolished it in 1924, recognizing legally a reality that had existed for a long time.

Where does that leave the Muslims? Is a single caliphate necessary for the functioning of the Muslim state? If not, will the Muslims revive the caliphate? Is the form of government of secondary importance as long as the *sharī'ah* is being applied and is supreme? Does Islamic law require that the Muslim states be democracies? These questions appear to be settled in the minds of some, while others continue to debate them. For the present discussion, however, it will be assumed that the basic rule is that the *sharī'ah* is to be supreme, whatever the form of government adopted by the people in a Muslim state. This conforms with the *grundnorm* stated above. The constitution adopted by a Muslim state must itself conform with the principles laid down in the Qur'ān and the *Sunnah* of the Prophet. Thus, in an Islamic state, the constitution itself should be validated in the light of Islamic law, and that as has been determined by the Supreme Court of Pakistan should be done by the people themselves, through their representatives.

The judgments mentioned above are highly instructive in identifying such issues and others besides them. We will have occasion to refer to them again in the final chapter of this book.

4.2. The interest of Man

Has the Lawgiver laid down laws in the interest (*maṣlaḥah*) of Man? If this is true, can the interest of man be an independent source of laws? Is man free to determine his own interest, or is it predetermined by the Lawgiver? These questions have always been at the forefront of Islamic legal theory. The answers form the basis of the principle of *istiṣlāḥ* that seeks to secure the interests (*maṣāliḥ*) preserved and protected by the Islamic legal system.[6]

[6] It is incorrect to translate *maṣlaḥah* as "public interest" and worse to call it "utility" on the analogy of the concept expounded by Jeremy Bentham. This will

The majority of the Muslim jurists agreed that the Lawgiver lays down laws in the interest of man. There have been some voices against it too, notable among them being the objections of the illustrious Imām al-Rāzī (d. 606). He gave extremely powerful arguments against this idea. His arguments are too complex and difficult to be related in a rudimentary discussion. Al-Rāzī did concede though that whenever we consider the laws and the interests of man, we find them lying side by side, or existing together, yet we cannot establish a causal relationship between them, that is, the laws are laid down because they serve the interest of man. Let us attempt to explain the problem in a simple way.

Take the case of a factory producing something. The sole purpose of the existence of this factory is the creation of a product. Every directive that is issued to the workers is intended to enhance the quality of this product or to create it on time, or to create a product that is more useful. The factory does not exist for the workers, but for the creation of that product. The effective production of goods requires, however, that the interest and welfare of the workers be kept in view, for that will lead to a better product. If a worker performs well he is rewarded or promoted, because he is in harmony with the process leading to the ultimate product. If he does not perform well, he will not be rewarded and may also be punished for breach of discipline. The factory does have laws to regulate the activity of the workers. These laws are laid down primarily to ensure an effective production of goods, though the laws may indirectly serve the interest of the worker.

Is Man the final product of this universe created by Allāh, or is the purpose of this universe something larger, larger than Man?

أَأَنتُمْ أَشَدُّ خَلْقًا أَمِ ٱلسَّمَآءُ بَنَىٰهَا

What! Are ye the more difficult to create or the heaven (above); (Allāh) hath constructed it.[7]

If Man is the sole purpose, then, all laws must have been made to serve his interest. On the other hand, if the purpose of the creation of the universe is something other than Man, then, is Man in the position of the worker, a servant of Allāh (*'abd Allāh*), who is to be rewarded if he performs well and punished if he misbehaves? The laws

become clear when al-Ghazālī's theory of the purposes of law is discussed.

[7]Qur'ān 79 : 27

in this case would appear to be lying side by side with the interest of Man, as al-Rāzī maintains, though they are actually serving some larger purpose. On the other hand, if Man is the sole purpose of the universe, the laws would be laid down to serve his interest alone. Thus, there would be a causal relationship between the laws and the interest of Man. In such a case, would he be called the vicegerent of Allāh (*khalīfat Allāh*)? Some jurists have conceded that it is proper to assign this title to Man; for the Qur'ān mentions it too, while others consider it as heresy and maintain that the reference in the Qur'ān is to some previous creation to which Man is a successor (*khalīfah*).[8] The latter jurists prefer to use the title "vicegerent of the Messenger" or *khalīfat al-Rasūl*. The answers to these questions are known to Allāh alone. That is where the jurists leave the discussion, and we should do the same.

In any case, the approach we take on this issue does not alter the decision on the interest of Man. There is some relationship between the interest of Man and the *ḥukm* of Allāh. It does not matter if this is a causal relationship. The majority of the jurists, therefore, agree that *maṣlaḥah* or the interest of Man may be employed for the derivation of new laws. This in no case means that the Muslims are free to make laws in accordance with whatever they deem to be their interest. The interest of Man is determined by the Lawgiver Himself, and there is a determined methodology for this. The jurists have taken great pains to lay down this methodology in a way that the laws derived through it may still be termed as the *aḥkām* of Allāh. It would not be an exaggeration to say that the key to the future development of Islamic law is through the doctrine of *maṣlaḥah*,[9] as will be shown later in this book.

4.3. *Sharī'ah* and natural law

Can the laws of Allāh be discovered by human reason independent of the sources? This is a question that relates to natural law. There have been heated debates among Muslim jurists over this issue, though the terminology used by them was different.

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[8] See e.g., Qamaruddin Khan, *The Political Thought of Ibn Taymīyah* (Islamabad, 1973) 78 for a discussion of Ibn Taymīyah's views on the subject.

[9] The intention behind the use of the word "doctrine" is to distinguish it from the narrower principle of *maṣlaḥah*. This will become obvious later when we discuss al-Ghazālī's theory of the purposes of Islamic law.

Natural law has a very long history beginning with Cicero and continuing right up to our times. The classical theory of natural law, as Hart puts it, is that "there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid."[10] It should be made clear that natural law has not always been associated with God, and even when it has been, its basic assumptions have not been dependent upon a belief in God. Our discussion, however, pertains to a much restricted version of natural law in which belief in Allāh as the Lawgiver and Master of the Universe is essential. To describe what we mean by natural law in this context, let us borrow a definition provided by John Austin. He says:

> Of the Divine laws, or the laws of God, some are *revealed* or promulgated, and others are *unrevealed*. Such of the laws of God as are unrevealed are not unfrequently denoted by following names or phrases: 'the law of nature;' 'natural law;' 'the law manifested to man by the light of nature or reason;'...
>
> ...Paley and other divines have proved beyond a doubt, that it was not the purpose of Revelation to disclose the *whole* of those duties. Some we could not know, without the help of Revelation; and these the revealed law has stated distinctly and precisely. The rest we may know, if we will, by the light of nature or reason; and these the revealed law supposes or assumes. It passes them over in silence, or with a brief and incidental notice.[11]

Austin also says that these unrevealed laws are the only laws which God makes for that portion of mankind who are excluded from the light of revelation.[12] We may qualify Austin's description of natural law by saying that these are laws that are to be discovered by mankind through REASON PRIOR TO REVELATION, that is, before the arrival of the light of revelation amidst a particular community. Once revelation has come, such laws may only be discovered in the light of revelation, because revelation does not pass them over in silence; it

[10] H.L.A. Hart, *The Concept of Law* (Oxford, 1961), 182.

[11] John Austin, *Lectures on Jurisprudence* (London, 1911) i, 104. (Emphasis in the original).

[12] Ibid.

indicates them through general principles. We are now ready to look briefly at some of the discussions of Muslim jurists.

There was complete agreement among Muslim jurists about the meaning of the words of the God, "The *ḥukm* belongs to Allāh alone."[13] The Mu'tazilah agreed with the majority that the source of all laws is Allāh, but they disagreed with them about the identification and discovery of these laws prior to revelation. They maintained that reason can discover the laws of Allāh, that is, the *shar'ī aḥkām*, in the absence of revelation. The Mu'tazilah were not alone in holding these views and there were other sects who held the same or similar views, especially the Māturīdīs, some of whom were Ḥanafīs, though their views were slightly different. The Ash'arites held the view that the laws of Allāh can be discovered through revelation alone and there is no way in which reason can discover these laws. The basis of this disagreement is the debate over *ḥusn* and *qubḥ* or good and evil or right and wrong.

The basic question was whether an act recognized by reason as good or right in itself became binding on the subject? Was he to act upon it even in the absence of revelation or prior to it? The Ash'arites, who presumably became the majority of the Sunnīs, maintained that even if reason could identify such an act there was no obligation to obey it or act according to it, the sole criterion for right and wrong being revelation. An extreme view of the Mu'tazilah appears to be that the laws of Allāh must conform with reason; in fact, some of them appear to have gone so far as to say that it is binding upon Allāh to lay down laws that conform with reason. This was objected to by many as it amounted to restricting the attributes of Allāh.[14]

The essential point in all this is whether reason can be used as a source of law for those things on which the *sharī'ah* is silent? In other words, if something is not expressly prohibited or commanded by the Qur'ān and the *Sunnah*, can the law for such a thing be discovered through reason? The answer of the majority appears to be a clear "No!" This, however, does not mean that reason has no part to play in the discovery of laws in Islam. The requirement is that all reason and reasoning must proceed from the principles of the Qur'ān and the *Sunnah*. The process is the same in many other legal systems.[15]

[13] Qur'ān 6 : 57

[14] See Ṣadr al-Sharī'ah, *Tawḍīḥ*, i, 345-47.

[15] In the United States, for example, during the confirmation hearings of Judge

The fundamental position of Muslim jurists is that there is no such thing as natural law outside the realm of the *sharī'ah* on which we can rely as soon as we discover that a rule of law is not directly discoverable from the texts. Such a rule, they insist, needs to be discovered directly or indirectly from the principles of Islamic law, and not from some "ominous brooding in the sky."[16] To explore the matter further, we may turn to the discussion of situations in which the *sharī'ah* is apparently silent.

4.4. Laws in cases where the *sharī'ah* is silent

A principle of Islamic law is that the Lawgiver has left out nothing for which a *ḥukm* has not been laid down. The basis of this principle is considered to be the verse, "We have neglected nothing in the Book (of Our decrees)."[17] If nothing has been left out, there is no scope for the exercise of independent reason for the discovery of laws, as discussed in the previous section, that is, for relying on some unknown body of laws supposedly "looming out there." Nevertheless, we find that there are many things in this modern world, at least, for which an explicit *ḥukm* cannot be found in the Qur'ān or the *Sunnah* and it is difficult to derive a *ḥukm* for it on the basis of strict analogy. Does the principle—that nothing has been left out—mean that even when the *ḥukm* has not been expressly stated it still exists implicitly, and we have to discover it in the sources? How do we go about the business of doing this and what methodology do we use?

One way of approaching the problem is to say that whatever is not mentioned expressly in the texts, and which cannot be dealt

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Clarence Thomas, there was a heated debate as to whether a judge should rely on natural law to restrict the right of a woman to seek abortion. The argument of those who opposed the use of natural law was that reasoning must proceed from the principles upheld by the law, rather than from the principles of natural law, and rights granted under the law must not be restricted by importing ideas and rights from natural law. Thus, in this case, they said, that a natural law right to life for the fetus should not be able to restrict the reproductive rights of a woman.

[16] A phrase used by Oliver Wendell Holmes for natural law.

[17] Qur'ān 6 : 38. Al-Shāfi'ī was the first jurist to emphasize this point, however, he quotes other verses to support this statement. He says: "There is no incident that befalls one of those who follow the *dīn* of Allāh without there being an evidence in the Book of Allāh providing guidance for it." Among the verses he quotes is verse 89 of Sūrah al-Naḥl: "And We have sent down to thee the Book explaining all things, a Guide, a Mercy, and glad tidings to Muslims." See al-Shāfi'ī, *al-Risālah* (Cairo, 1309/1891) 20.

with through analogy (*qiyās*), is permissible, that is, it belongs to the category called *mubāḥ*. This, in fact, is a principle of Islamic law, which in general terms states: *The original rule for everything, except for sexual activity, is that of permissibility (ibāḥah), unless a legal evidence prohibits it.*[18] This would imply that anything that is not expressly mentioned in the texts need not be assigned a *ḥukm* and should be left to function under the original rule of permissibility. In other words, anything that has not been specifically prohibited by Allāh is permissible. This principle forms the foundation for the Shāfi'ite principle of *istiṣḥāb*. Such an understanding would be one way of explaining the actions of governments that are concerned only with "Islamizing" the laws contained in the books of the jurists, for almost all the *aḥkām* there can either be found in the texts or can be linked to the evidences through analogy. Perhaps, these governments wish to leave the rest of the laws untouched. One also finds many learned scholars asserting this rule in support of the permissibility of many modern activities for which a *ḥukm* may be needed. Some of them insist on this rule without even considering it as a whole, while others, it appears, ignore its overall implications. There are difficulties involved in this approach.

Further, it is not clear from the texts of the jurists, who uphold this principle, whether an act that is not explicitly mentioned by the texts becomes automatically permissible, or whether evidence has still to be adduced from the texts, either directly or indirectly, to justify the permissibility of the act. If we have to justify this permissibility, the benefits of the principle appear to fade away.

There is another aspect of the problem. This becomes obvious when the opposite implication of the principle is considered. If all things are permissible, unless expressly prohibited by the *sharī'ah*, such permission comes from Allāh. How, then, can anyone, without a valid evidence, prohibit something that is permitted by Allāh? For the sake of argument, let us consider the case of smuggling carried on between two neighboring Muslim countries. Is it not trade that has been permitted by Allāh, not only implicitly, but explicitly in the Qur'ān? Will not the prohibition of such trade amount to the restriction of a fundamental right granted by Allāh? Is it evasion of tariff? Is the imposition of tariff valid among Muslims? This is a hypothetical example and the purpose is merely to show that on the basis of this

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[18] الأصل في الأشياء الإباحة والأصل في الأبضاع التحريم

principle any prohibition, whatever its nature, can be challenged as being un-Islamic, because no one has the right to prohibit something permitted by Allāh, without a direct or indirect evidence from the *sharī'ah*. Scholars usually invoke necessity (*ḍarūrah*) in such cases, but duress normally declares things permissible, it rarely, if ever, prohibits things. The only principle that can be invoked is *sadd al-dharī'ah*, that is, plugging the legal means to an illegal objective, but is this a valid principle? Is the objective illegal? Further, even this may not work in certain cases. Let us now consider a different approach for situations where the *sharī'ah* is silent.

Al-Suyūṭī (d. 911) is of the view that the principle of permissibility discussed above is professed by the Shāfi'ites. The Ḥanafites, he says, uphold the opposite principle: "The original rule for each thing is prohibition, unless the *sharī'ah* permits it."[19] Al-Suyūṭī borrows this statement from the Imām al-Ḥaramayn, al-Juwaynī. One does find some of the Ḥanafites invoking the principle of permissibility at times,[20] but the general approach of the Ḥanafīs seems to confirm the principle of prohibition as a basic methodology. This could be one reason why the Ḥanafīs feel the need for invoking *istiḥsān* based on *ḍarūrah* for declaring permissible things that appear to be permissible on the face of it, like hire (*ijārah*) for example, for which evidences can be found in the texts.

If the principle of prohibition is accepted as a basic method, it is likely to ensure that a *ḥukm* will be found for each activity in an Islamic state. Such permission or permissibility will proceed from the principles of Islamic law. This is what all the jurists appear to have done in practice, even the Shāfi'ites. Whatever custom or practice was found in a new region it was analyzed for legality and was either rejected or it was accommodated within the fold of Islamic law. This approach guarantees complete Islamization and absorption of all laws in a more reliable manner, and makes the phrase "Islam is a complete

[19] Al-Suyūṭī made this statement is his book *al-Ashbāh wa al-Naẓā'ir*. This was reproduced by Ibn Nujaym in his book with the same title. Ibn Nujaym (d. 970), *al-Ashbāh wa al-Naẓā'ir* (Bayrūt, 1980) 66.

[20] Ibn Nujaym, *al-Ashbāh wa al-Naẓā'ir* 66. Baḥr al-'Ulūm, commenting on the words of Muḥibb Allāh al-Bihārī, says that the principle of *ibāḥah* is upheld by the Ḥanafīs alongwith the Shāfi'īs, but he acknowledges that there are many things besides sexual activity that are prohibited. Thus, murder and assault, as well as sexual activity, are also prohibited. Baḥr al-'Ulūm asserts that mankind has never been without guidance from Allāh, right from the days of Adam, therefore, most of the things prohibited are known. See 'Abd al-'Alī ibn Niẓām al-Dīn al-Anṣārī, *Fawātiḥ al-Raḥamūt*, i, 49–50.

code of life" more meaningful. This, however, is merely an opinion and others may disagree. Further, this principle may have its own problems.

It is obvious that eighty per cent or more of the activities of a modern state are not covered by the books of Muslim jurists, and would need an effective methodology for the derivation of the necessary *aḥkām*. This methodology has been developed by the *fuqahā'* and will be described in the third part of the book.

4.5. The limits of Islamic law

Islam, it is generally acknowledged, is a "complete code of life" and at the core of this code is the law of Islam. This implies that a Muslim through his submission to Islam not only accepts the unity of God, the truth of the mission of Muḥammad, but also agrees through a contract (*bay'ah*) with the Muslim community that his life be regulated in accordance with the *aḥkām*[21] of Allah, and in accordance with these *aḥkām* alone. No other sovereign or authority is acceptable to the Muslim, unless it guarantees the application of these laws in their entirety. Any other legal system, howsoever attractive it may appear on the surface, is alien for Muslims and is not likely to succeed in the solution of their problems; it would be doomed from the start.

A comprehensive application of these laws, which flow directly or indirectly from the decrees (*aḥkām*) of Allah, would mean that they should regulate every area of life, from politics to private transactions, from criminal justice to the laws of traffic, from ritual to international law, and from the laws of taxation and finance to embezzlement and white collar crimes. The books[22] of the *fuqahā'* (Muslim jurists), however, do not deal with all these areas of the legal system,

[21] *Aḥkām* is the plural of *ḥukm*. The term *ḥukm* has been translated into English in different ways: injunction, command, prescription, and *shari'ah*-value. None of these terms conveys completely the comprehensive meaning of the term, as will be obvious in the discussions to follow. It is preferable to retain such terms in their transliterated forms.

[22] These are manuals of substantive law, as distinguished from the books on *uṣūl al-fiqh*. Similar books, patterned on the Muslim manuals of law, have been called "codes" by the Jewish scholars. See, e.g., the code by Maimonides, and the later *Shulḥān Arūkh*. The term "code" is being avoided here, as it denotes a document enforced by the state. The Muslim manuals, or the Jewish for that matter, were never enforced by the state.

nor were they meant to do so. Yet, all attempts at "Islamization" of laws, in some of the Muslim countries, have focused only on the laws detailed in the books of *fiqh*. A comprehensive approach to the law, in its totality, has been lacking. Perhaps, it has been assumed that Islamization will have been undertaken if the laws described in the *fiqh* books are enforced, leaving the rest of the area in the control of the secular authority, to be shaped and reformed as thought fit. This is not likely to have much effect on Muslim society as a whole. It would amount to no more than an addition to the personal law of the Muslims, which is already applicable in the Muslim countries, as well as in some secular countries like India. What, after all, would be the difference between a Muslim country that enforces only the personal law of Muslims and between India, a secular country that does the same? The only difference would be that the percentage of Muslims living in that country would be greater than the percentage in India.

Despite the application of the personal law and the additions made to it in recent times in some countries, the demand for Islamization arises again and again. It is obvious that the Muslims want the entire law to be Islamized so that they can feel its impact on their lives; small additions to their personal law are not likely to satisfy them. In addition to this, emphasis on Muslim personal law alone is likely to relegate the vital forces of Islam to the background, as is the case with other great religions, reducing it to the status of a "personal affair." This, in our view, is contrary to the spirit of Islam.

There would be very few Muslims who would agree to confine Islamic law to personal matters of inheritance, marriage, and divorce, or to a few penalties that are actually laid down as deterrents by the Lawgiver, and are meant to be applied rarely. They would deem it imperative that Islamic law deal with matters covered by the law of torts, the law of contracts, taxation, and above all constitutional law and fundamental rights. They would like to see Islamic law taking into its fold the laws of business organization and commerce. Of particular interest to them would be the seeking of justice under administrative law, labor law, and the laws governing the granting of government contracts, which in most places are a source of exploitation and corruption. Most former British colonies would especially like to see the criminal procedure codes to be altered in the light of Islam. Many such laws are the heritage of a colonial past, laws designed to enslave nations, laws that are being retained by the present

rulers against the interests of an aware, yet often helpless public.

It is true that the books of the *fuqahā'* did not deal with the details of Islamic law in its totality. This led to the development, by the rulers, of many institutions and laws with which the *fuqahā'* had very little to do. Many Orientalists have, therefore, concluded that there was a separation between theory and practice in the Islamic legal system; what the *fuqahā'* laid down in their books stayed in the books, while the rulers and sultans did as they pleased. The question is why did the *fuqahā'* ignore many areas that seem so important to us today and must have appeared important to them too? In fact, they even mentioned these institutions sometimes without even a hint as to their legality. It cannot be said that they were busy developing the law contained in their books and did not have time for such matters, while the rulers exploited the opportunity to elude the dictates of the *sharī'ah*. The *fuqahā'* had fourteen centuries in which at least some of them could have taken up the burden. It has already been suggested that the *fuqahā'* left these matters to the rulers by design. There is a method in their avoidance of some issues. In other words, the *fuqahā'* dealt with a part of the law, which they considered their duty to develop, leaving the rest to the rulers in each age.[23] This is an important issue that attempts to penetrate the nature of Islamic law. It will be explained further in the chapters to follow.

4.6. Law as a growing tree

Islamic law is like an ever-growing tree. The seed of this tree was sown in the hearts and minds of men, fourteen hundred years ago, by Muḥammad, the Messenger of Allāh. Since then it has taken root, grown, and spread its branches on all sides. With each passing century, the tree grows in size. Its evolution and growth never stop. Its spreading branches cast their shade on all sides covering different cultures, peoples, and races.

Like the trunk of this tree, Islamic law has a part that is fixed, and like its branches and leaves, the law has a part that changes in shape and color in every season. The fixed part of this tree is closer to the roots and cutting this part is likely to damage the tree itself. Like the trunk of this tree, the fixed part of Islamic law has grown directly from its roots or sources. Changing this fixed part will affect the nature of the legal system. Like the branches of the tree, the

[23] The rulers are to base their methodology on the principle of permissibility or that of prohibition, as discussed earlier.

flexible part of the law has been changing with the times, sometimes yielding abundant fruit, sometimes less.

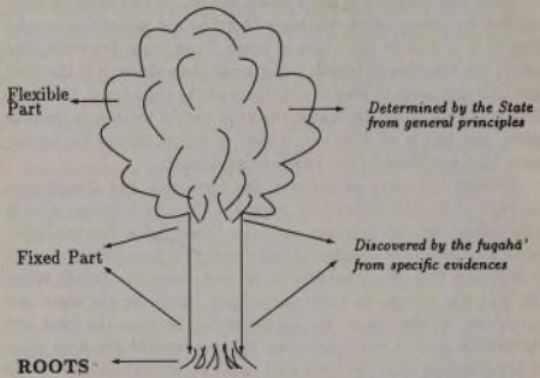
When the branches of this tree are cut off, its cool shade is missing, but its strong trunk continues to guide and protect those who cling to it in storms and times of crisis. Thus, when the state does not let the branches of Islamic law provide their shade, it is the fixed part that continues to keep the Muslims on the right track. For those Muslims living in secular states, the fixed part of the tree is the only guide, and this is all they are obliged to follow, except for certain parts that are beyond their power to implement.

Tending the trunk of the tree, the fixed part, has always been the task of Muslim jurists (the *fuqahā'*). They have looked after it with loving care for fourteen centuries. Their labor has made the trunk so strong that ceaseless attacks against it have failed to budge it. Not only this, many attacks on its roots have also failed. When the tree was young, its stem was tended jointly by the state and the jurists, as then there was no distinction between the fixed and the flexible part. It was later, when the tree reached a mature stage of development, that the fixed part could be distinguished from the changing part with ease. At this stage the jurists left the care of the flexible part in the hands of the *imām* or the state, while they devoted themselves to the strengthening and refinement of the fixed part of the law. The only condition that the jurists imposed upon the *imām* for developing the flexible part of the law was that he be a qualified jurist (*mujtahid*), that is, he should employ a valid methodology, either directly or through delegation, for developing this part of the law.

The rulers in some ages did care for the branches of this tree, while in others they did not. On occasions, some rulers cut off the branches that had grown in earlier ages and started all over again. This discouraged the development of firm offshoots from the tree, that is, the development of legal institutions and practices that could be developed further in later ages. After some centuries, when the Muslim empire split up, the branches of the tree were divided into different segments on different sides, with each ruler looking after the branches on his own side of the tree, as it suited his wisdom. Some took interest in this law while others did not. Thus, for example, the Ottoman rulers tended these branches in their own way in the Ottoman empire, while Awrangzeb 'Ālamgīr developed the law in his own fashion in India.

The period of these rulers was followed by violent storms around

Figure 4.1: The Growing Tree



this tree, and alien winds struck it destroying the branches on all sides. On some sides the Muslims pulled down the branches themselves. The age of colonization left nothing, but the solid trunk of the tree, which could not be uprooted with ease, thanks to centuries of dedicated work by Muslim jurists. When the storms were over and the Muslims were left alone to take care of the tree, all they could see was the trunk of the tree with no branches or leaves. In their confusion they started blaming the jurists for not having looked after the branches, and having fallen prey to *taqlīd*. They failed to distinguish between the fixed part and the flexible part. They did not realize that it was some of the rulers and not the jurists who were to blame for not having established lasting institutions. Some even tried to bring branches from other alien trees to hang on their own tree, least realizing that these would rot one day. Today, some Muslim states are trying to look after the tree in their own way and on their own side, while others are busy trying to cut down the tree and even dig at its very roots. Nevertheless, branches have begun to sprout and it will not be too long before they start to bear fruit. Indeed, they must bear fruit, because the culture, history, life, and the very identity of Muslims are associated with this tree.

A question may be asked here as to what we mean by the "fixed"

part of the law. Very simply, the law that is stated explicitly in the texts, the Qur'ān and *Sunnah*, or is derived through strict analogy (*qiyās*), is more or less fixed. The rules relating to *'ibādāt* are fixed; the rules relating to inheritance are fixed; the rules relating to marriage and divorce are fixed; and the rules relating to the *ḥudūd* penalties are fixed. These laws are not likely to change over time. In comparison, if we make laws about income-tax, traffic, new forms of crimes, and other areas in accordance with the *sharī'ah*, we might change them through fresh *ijtihād* in a later age, because these rules are not stated explicitly in the texts.

Islamic law has no parallel in history. It is the only legal system that has accommodated a large variety of races, peoples, and cultures for such a long time. Some of its features, however, may be compared to those of the English common law. Like the common law, Islamic law has not been enforced by the state through codified law. It relies for adjudication on a body of principles that are upheld by the system. While the principles of common law may be found in ancient decisions, the principles of Islamic law are laid down in the Qur'ān and the *Sunnah* of the Prophet. The principles of common law may change and be modified over time, but all the principles of Islamic law are not subject to change. Some are fixed, while others derived by the jurists may be modified in the light of the fixed principles.

One strength of the common law is that it lends itself to adaption. It is today applied in somewhat different forms in England, United States, Australia, Canada, and even in former colonies with widely differing cultures like India and Pakistan. This has been the strength of Islamic law from the start, and is reflected in its schools with their different methodologies. Each school has served a more or less contiguous geographical region, accommodating the cultural and local preferences. The flexibility based on a multiplicity of schools serves not only geographical areas and nations but individuals too, who may move to another school if they do not like the one they follow.

Another feature of the common law is that it is a precedent-based legal system, as compared to the civil law practiced in Europe. Islamic law combines both features with some schools advocating reliance on precedent. In short, the maturity, stability, and longevity exhibited by Islamic law are not exhibited by any other legal system. The reason is that Islamic law has a built-in and indestructible feature of adaptability, a feature that is vital for the survival of every living organism.

Chapter 5

Law and its Classification: The *Ḥukm*

The structure of Islamic law, its classification, and the consequential obligations and duties, revolve around a set of rights. Most writers on Islamic law focus their attention on the five-fold classification of Islamic laws. This is the well known division into *wājib* (obligatory), *mandūb* (recommended), *mubāḥ* (permissible), *makrūh* (disapproved), and *ḥarām* (prohibited). The classification is important in itself, but it must be realized that it is not a classification of laws; it is a classification of obligations resulting from the operation of the laws. In this chapter we will try to adopt a different approach for understanding the classification of Islamic law. This approach can generally be gleaned from the writings of, at least, two Ḥanafī jurists: al-Sarakhsī (d. 496) and Ṣadr al-Sharī'ah. The reason why we will be using materials from Ḥanafī works is that not only is Ḥanafī law the most structured and developed, but the Ḥanafī school has had the greatest experience and association with the actual administration of justice, throughout Islamic history.

Let us begin by saying, borrowing the terminology used by H.L.A. Hart, that Islamic laws are first divided into primary and secondary rules. It may come as a surprise to some if we say that the division of rules into primary and secondary, adopted by Hart,[1] as well as the idea of union of these rules to give rise to a system of rights and duties, is almost the same as that adopted by Muslim jurists more

[1] H.L.A. Hart, *The Concept of Law*, 77-96.

than one thousand years ago.[2] The only difference is that the rules of Islamic law, being based on religious law, present a picture that is much more complex. The category of primary rules is designated by the Muslim jurists as the *ḥukm taklīfī*, or a category of rules that give rise to obligations in some form or impose duties. The category of secondary rules is designated as the *ḥukm waḍ'ī* or a category of rules that determine the relationship between a cause and its consequential obligation, the relationship between certain conditions and the associated act, or the existence of exemptions. All this will be explained shortly. There are other secondary rules that determine how the laws are implemented, renewed and validated, but we cannot go into too many details in a rudimentary discussion such as this. A full explanation requires an exhaustive study devoted to these divisions. Suffice it to say, that some of these rules considered secondary by Hart are considered as primary by Muslim jurists, because Islamic law is a religious law. The role and function of such secondary rules, however, is recognized by Muslim jurists in the same way.

Each primary rule or *ḥukm taklīfī* is based on a right. There are three kinds of basic rights in Islamic law: the right of Allāh, the right of the individual, and the rights of the individuals collectively or the right of the state. The third category of rights is mentioned very seldom by jurists, because it relates to the area of law with which they did not deal directly. This is the area left to the *imām*. Recalling our example of the tree, we may say that this right pertains to the flexible part of the law, the area of the branches of the tree. This kind of right is sometimes designated as the right of the ruler (*ḥaqq al-sulṭān*)[3] or as the right of the state (*ḥaqq al-salṭanah*).[4] Some modern writers have unfortunately lumped up some of these rights together, and thereby created difficulties in the comprehension of the structure of the law. I would like to emphasize here that THE RIGHT OF ALLĀH IS DISTINCT AND INDEPENDENT OF THE RIGHT OF THE STATE. This is of crucial significance in understanding the structure of Islamic law. On the other hand, when we use the term *ḥuqūq al-'ibād* in the plural we may mean the rights of individuals generally, or we may mean the collective rights of the individuals, that is, the rights of the community as a whole. In this latter sense, that is, the rights

[2]Those who wish to understand this system in greater detail must consult Hart's outstanding work, *The Concept of Law*.

[3]See Ibn Rushd, *Bidāyat al-Mujtahid*, ii, 303.

[4]See al-Māwardī, *al-Aḥkām al-Sulṭāniyah*, 237–38.

of the community, the implication should be the same as the rights of the state or *salṭanah*. Again, the rights of the state should not be merged with the rights of Allāh. Once this has been understood, we may say that sometimes the right of Allāh may coexist with the right of the individual. In these cases, it is either the right of Allāh that is predominant or it is the right of the individual that is in the forefront. This gives rise, in all, to the following kinds of rights:

1. The right of Allāh (*ḥaqq Allāh*)
2. The right of the individual (*ḥaqq al-'abd*)
3. The right of Allāh lying side by side with the right of the individual — with its two cases of predominance of one or the other.
4. The collective rights of the individuals or of the community, also referred to as *ḥaqq al-salṭanah* or *ḥaqq al-sulṭān*.

The classification of rights is of great significance in understanding the structure and operation of Islamic law. There are many practical consequences attached to these rights. The discussion of how these rights affect the overall structure of the legal system is postponed till a later chapter. For the present we need to focus on the classification of primary and secondary rules, and also on the obligations arising from the primary rules. Let us, therefore, look at how the Ḥanafīs classify laws.

5.1. Classification of primary rules

It must be pointed out again that the jurists deal with the fixed part of the law, therefore, they do not mention the classification of the rules within the category of the right of the state. For the jurists it falls within the category of the right of the individuals collectively. In actual fact, it is left to the *imām*, who is theoretically a full *mujtahid*, to decide how the rights of the state are to be classified. This may vary in different ages. The classification that follows deals with the fixed part of the law.

The proper classification of laws was first provided by the Ḥanafī jurist al-Sarakhsī.[5] Does this mean that the other jurists did not do

[5]Shams al-A'immah Abū Bakr Muḥammad ibn Abī Sahl Aḥmad Al-Sarakhsī

so, or were not concious of such a classification? Indeed, they were, and they presented such a classfication, but in a manner that modern writers, especially those who belong to disciplines other than law, fail to notice, or fail to put in its proper perspective. The majority of the jurists classified laws under the heading of *maḥkūm fih* or the act to which the *ḥukm* is related. Under the heading of the *ḥukm shar'ī*, they give an account of the obligations arising from the operation of the act in relation to the *ḥukm*. Al-Sarakshsī combined the two. It is in this combined form that we approach the subject here.

Al-Sarakshsī says that all *aḥkām* are divided into four kinds of rights. These are further subdivided as follows:

1. Rules that relate to to the right of Allāh alone. These are of eight kinds:

   - *Pure Worship.* The first of these is belief in Allāh or *īmān*. The second is prayer. The third is *zakāh*. The fourth is fasting (*ṣawm*). The fifth is *ḥajj*. The sixth is *jihād*. There are other acts of worship associated with the above like *'umrā* and *i'tikāf* (seclusion in a mosque).
   - *Pure punishments.* These are the *ḥudūd* penalties that have been instituted as deterrents, as a pure right of Allāh.
   - *Imperfect punishments.* The example of this type is prevention from inheritance in case of murder, that is, the murderer cannot inherit from the victim.
   - *Those vacillating between a worship and a penalty.* These are the *kaffārāt*, that is, expiation made for different reasons.
   - *Worship in which there is an element of a financial liability.* The example for this is *ṣadaqat al-fiṭr*, which is a payment made before the *'Īd* following Ramaḍān.

(490/1097), *Kitāb al-Uṣūl* (title page *Uṣūl al-Sarakhsī*) Ed. Abū al-Wafā' al-Afghānī 2 vols. (Cairo, 1372). See the last chapter in vol. 2. I have given a different citation form for al-Sarakhsī by using his full name. In my opinion, al-Sarakhsī was one of the greatest jurists of all times. He had a powerful legal mind. He is not very popular with scholars, perhaps, because of his flowing style. His gigantic work *al-Mabsūṭ*, which is a commentary on a precis of Muḥammad al-Shaybānī's works by Ḥākim al-Shahīd, is the consolidated and authentic version of Ḥanafī law. There is no other law book in the entire Islamic legal literature that can match the power of this book. His book on *uṣūl* is equally good.

- *Financial liability in which there is an element of worship.* This is like *'ushr*, the ten percent charge levied on the produce of land.
- *Financial liability in which there is an element of a punishment.* The example given by al-Sarakhsī is that of the *kharāj* tax.
- *Those that exist independently.* These are three: those laid down initially as a rule; those that are imposed as an addition to a rule; and those that are associated with the initial rule. The examples of these are the *khums* levied on cattle, minerals, and treasure-troves.

2. Those in which the right of Allāh and the right of the individual lie side by side, but the right of Allāh is predominant. These are like the the *ḥadd* of *qadhf*. Please note that for the Shāfi'ī jurists this is a pure right of the individual.

3. Those in which the right of Allāh and the right of the individual lie side by side, but it is the right of the individual that is predominant. For this category the example is *qiṣāṣ* or retaliation for bodily injuries or culpable homicide amounting to murder.

4. The last category is that of the right of the individual. This category includes almost everything that is not included in the above and is beyond reckoning. The important point to consider is that al-Sarakshsī does not mention *ta'zīr* or discretionary penalties. The reason is that the discretionary penalties fall within the category of the right of the individuals, when these are considered collectively, that is, they are the right of the state. The Ḥanafī jurist al-Kāsānī clearly states that all *ta'zīr* relates to the right of the individual.[6] The Shāfi'ī jurist al-Māwardī has caused some confusion by stating that some *ta'zīr* penalties fall under the right of Allāh.[7] Al-Māwardī's statement

[6] Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vii, 65. He makes this statement while explaining how *ta'zīr* is proved.

[7] Al-Māwardī, *al-Aḥkām al-Sulṭāniyah*, 236. This is not to say that his statement is incorrect. In fact, in the Shāfi'ī school to which he belongs, even the *ḥadd* of *qadhf* is a right of the individudal. He includes other penalties within the *ḥudūd*, like the refusal to pay debts, and considers them the right of the individual. Ibid. 223.

leads to analytical inconsistencies, as will be discussed in a later chapter. Some later Ḥanafī jurists have also given confusing opinions on the issue. For our purposes, we adopt the more reliable Ḥanafī view.

The above classification is generally adopted by all the Ḥanafī jurists and is discussed in detail by Ṣadr al-Sharī'ah.[8] Al-Sarakhsī has given detailed reasons for the inclusion of each example under a particular heading and is beneficial for those interested in further analysis.

This classification pertains to primary rules and shows how each type of law is linked with a right, which is either a right of Allāh, or the right of the individual, or the right of both. We may now turn to the classification of the obligations arising from the primary rules.

5.1.1. Obligations arising from primary rules

The major focus of Muslim as well as Western writers has been on the classification of obligations arising from primary rules. Some have assumed this to be the classification of the laws itself. This is quite natural, because the idea is tied to the definition provided by the jurists for the *ḥukm shar'ī* or Islamic law. It is also tied in with the derivation of a rule of law from the text, because the first thing that concerns the jurist is whether a command in the texts implies an obligation, a recommendation, or something else. To understand this we will examine the definition of the *ḥukm shar'ī* provided by jurists in some detail, because this is usually given prominence, not only in the books of modern scholars, but also in the books of earlier jurists.

John Austin's theory of law, which states that laws are commands of the sovereign backed by threats of punishment, was first criticized by Kelsen and more recently by Hart. Hart maintains that the Austinian theory fails to explain different kinds of laws that are not commands.[9] Such laws are called the "secondary rules" of a legal system by Hart, while those that create obligations are termed as "primary rules." Rules that facilitate the conclusion of contracts, for example, cannot be considered as commands creating obligations, nor can those rules that enable the officials to change, create, or enforce laws within the legal system. These are power conferring rules. The

[8] Ṣadr al-Sharī'ah, *al-Tawḍīḥ*, ii, section on the *ḥukm shar'ī*.

[9] H.L.A. Hart, *The Concept of Law*, 84–88.

Austinian theory fails to explain such rules. Hart himself presents a model of a legal system in which commands play no role, and it is a "rule of recognition" that enables the legal system to identify a new rule as valid law.[10] Earlier Hans Kelsen had presented the idea of a basic rule or norm (*grundnorm*) as unifying, and laying, the foundations of a legal system.[11]

Hart also shows that a modern legal system, as distinguished from a primitive one, comes into existence through a union of the primary and secondary rules. Hart's distinction between primary and secondary rules and their union is perhaps his most important contribution to the analysis of modern legal systems. An identical contribution was made by Muslim jurists, as has already been indicated, more than one thousand years ago. Although dealing with a legal system based on religious law (which Austin called law proper) they described Islamic law as composed of primary and secondary rules, or laws that create obligations and rules that facilitate the operation of the primary rules. They described in detail how the Islamic legal system comes into operation through a union of the primary and secondary rules. In addition to this, Muslim jurists not only postulate a basic norm, but also give the details of a rule of recognition that flows directly out of this *grundnorm* and performs exactly the same function as that described by Hart. The definition they provide for Islamic law avoids the criticisms Hart levelled against Austin's definition. This definition not only describes laws that are commands, but also takes into account those secondary rules that facilitate the operation of the primary rules.

A definition of Islamic law

The Arabic word *ḥukm* (pl. *aḥkām*) means a "rule." This may be a rule of any kind. Thus, it may be a rational rule, like 2 + 2 = 4, or the rule that the whole is greater than its parts. It may be a rule perceived by the senses, like fire burns. Again, it may also be based upon experience or experiment, like aspirin is good for headache (and bad for the kidneys). When we wish to consider a rule of Islamic law, we qualify it with the term *shar'ī* (legal), or a rule belonging to the Islamic *sharī'ah* or law. It is the *ḥukm shar'ī* that is defined by

[10] Ibid. 92–93, 96–120.

[11] Hans Kelsen, *General Theory of Law and State* (Wedberg tr., 1945); *Pure Theory of Law* (Knight tr, 1967).

Muslim jurists, when they attempt to answer the question: What is Islamic law? They define it as:

خطاب الله تعالى المتعلق بأفعال المكلفين بالاقتضاء أو التخيير أو الوضع

> A communication from Allāh, the Exalted, related to the acts of the subjects through a demand or option, or through a declaration.

The first point to notice about this definition is that *ḥukm* or a rule of law (to be referred to as *ḥukm* from now on) is a communication from Allāh. This means that it is not treated merely as a command. It also means that a communication from anyone else cannot be considered as a *ḥukm*, be he a ruler or someone else. Needless to say that such a *ḥukm* has to be identified before it can be declared as such. This is where the "rule of recognition" or the system of validation comes into play. The details of this rule of recognition will be explained in part three of the book.

Second, the communication is related to the acts of the subjects. This relationship enables the jurist to understand whether the requirement is for the commission of the act or its omission, or whether a choice has been granted for the commission or omission of this act. Thus, the words of Allāh, "Do not go near unlawful sexual intercourse (*zinā*),"[12] contain a *ḥukm* that requires omission.

Third, the *ḥukm* may be expressed through a demand. The demand in this case may be for the commission of an act or its omission. In each case the demand may be expressed in binding terms or otherwise. When the demand is expressed in binding terms and requires the commission of an act, the *ḥukm* creates an obligation (*ījāb*). When the terms used are not binding or absolute, the *ḥukm* gives rise to a recommendation (*nadb*) for the commission of the act.

When the demand in the *ḥukm* is for abstention or omission of an act and is expressed in binding or absolute terms, the *ḥukm* conveys a prohibition (*taḥrīm*). If the demand is not expressed in binding terms the act is looked down upon and is considered reprehensible (*makrūh*).

The definition has so far given four categories of obligations arising from primary rules with obligation at one end and prohibition at the other, with the two categories of recommendation and disapproval in between. These categories are associated with primary rules that create obligations, that is, obligations for the commission

[12] Qur'ān 17 : 32.

or omission of an act. These obligations are mostly associated with sanctions. When the obligations relate to ritual or worship the sanctions pertain to the Hereafter or to censure through public opinion, and when the obligations relate to other matters they invoke sanctions in the form of punishment in this world.

Fourth, the *ḥukm* may grant a choice or option to the subject for the commission or omission of an act. In other words, the subject is free to perform the act at his discretion. The bulk of the Islamic laws fall under these categories and include all kinds of contracts and transactions. What Hart terms as "power-conferring rules" may fall under this category. This is the area that Austin's definition fails to explain, in Hart's view. The category is known as permissible or *mubāḥ*. It is not to be concluded from this that the subject is free to do anything he likes under the protection of this category. All laws in this category too are validated by the "rule of recognition" of Islamic law, and we have already seen this in the previous chapter, while discussing the issue of laws in cases where the *sharī'ah* is silent.

Finally, the definition states that the communication may be expressed through a declaration. This is the area of pure secondary laws. In this case, the communication declares or determines the relationship of an act or set of facts with the act of the subject or its related *ḥukm*. The communication, therefore, declares that an act or set of facts is the cause (*sabab*), condition (*sharṭ*), or an impediment (*māni'*) for the application of the *ḥukm* related to the act of the subject. For example, in the *ḥukm* of the payment of *zakāt* (obligatory religious contribution), the possession of a minimum amount of wealth (*niṣāb*) is the cause for the application of the *ḥukm*, having retained this wealth for a year (*ḥawl*) is a condition for the *ḥukm*, and the existence of debts against the subject may be the impediment or obstacle in the way of fixing liability for *zakāt*. We shall take up this topic in some detail while discussing the union of the primary and secondary rules.

From these types Muslim jurists form two main categories for the *ḥukm*. The first is called the *ḥukm taklīfī* or the obligation-creating *ḥukm*. This is the category of primary rules. None of these are designated as commands, though some do carry the force of commands. The second category is called the *ḥukm waḍ'ī* or the declaratory *ḥukm*. These are the secondary rules. Some of the secondary rules like those of adjudication may overlap the two categories. The rules of change or of making new laws, however, are related to the "rule

of recognition" of Islamic law. The rules of change fall within the flexible sphere of law.

We may now list the categories discussed so far and point out a few more categories of secondary rules to complete the discussion.

The *ḥukm taklīfī*

The emerging categories of the obligations arising from primary rules, or rules that create obligations, are five:

1. Obligatory (*wājib*)
2. Recommended (*mandūb*)
3. Reprehensible (*makrūh*)
4. Prohibited (*ḥarām*)
5. Permissible (*mubāḥ*)

These five categories emerge from the operation of laws in the opinion of the majority of the schools of Islamic law. The Ḥanafīs derive seven categories from the same definition:

1. *Farḍ*: Obligatory. This obligation arises from an evidence or source that is definitive with respect to its implication.
2. *Wājib*: Obligatory. This obligation is slightly weaker than the first. It arises from a source that is probable with respect to its implication and authenticity.
3. *Mandūb*: Recommended. The difference between recommendation and the two kinds of obligation above, it should be recalled, is based on the binding or absolute nature of the command.
4. *Makrūh karāhat al-taḥrīm*: Abomination. This category arises from a definitive evidence not expressed in binding terms. It is close to prohibition.
5. *Makrūh karāhat al-tanzīh*: Disapproval. It arises from a probable evidence.
6. *Ḥarām*: Prohibited.
7. *Mubāḥ*: Permissible.

Some writers try to ignore this division by saying that the addition of two categories by the Ḥanafīs has no practical significance. This seems questionable, for there are some practical consequences though they relate mostly to ritual and in one case to apostasy.

The definition provided above was preferred by Muslim jurists. There is, however, nothing binding about it. It places more emphasis on the obligations arising from the primary rules. We may, if we like, provide other definitions for Islamic law from different perspectives.

The classifications of the secondary rules also flow from this definition, but let us try and look at them independently.

5.2. The *ḥukm waḍ'ī* or secondary rules

The definition provided above stated that the communication from Allāh may be related to the acts of the subjects in a manner that is declaratory. This is stated in order to accommodate rules that cannot be classified under the primary rules. There is also a certain disagreement among writers as to what is included in the secondary rules and what is not. We will include those that are generally classified under the secondary rules. The categories derived are:

1. *Sabab*: It is the cause on the basis of which a primary rule or *ḥukm taklīfī* is invoked or is established.[13]

[13]The literal meaning of *sabab* is the means to a thing. In its technical meaning it is what the Lawgiver has determined to be the identifier of a legal rule so that its existence means the presence of the rule, while its absence means the absence of the rule. See al-Ghazālī, *al-Mustaṣfā*, i, 93-94. Thus, it is each entity or incident whose existence the Lawgiver has determined to be the prerequisite for the existence of the *ḥukm*, and its absence an indication of the absence of the *ḥukm*. Unlawful sexual intercourse is a cause for the obligation of implementing *ḥadd*, while insanity is the cause for interdiction, but when these causes are missing there is no obligation to impose *ḥadd* or interdiction.

The cause *sabab* is divided with respect to the act of the subject into two types. The first is not dependent on the act of the subject, nor is it within his power to bring it about. Yet, when such a cause is found the *ḥukm* exists, like the setting of the sun as a cause for the obligation of the evening prayer, and the beginning of the month of Ramaḍān as a cause for the obligation of fasting, and like insanity for the obligation of interdiction. The second type is an act of the subject and is within his power to bring about, like journey for the permissibility of not fasting, or premeditated murder for the obligation of *qiṣāṣ*, or the formation of contracts as a cause for enforcing their performance. Such an act may itself be the subject of a primary rule, that is, it would be required or prohibited or recommended, and it may fall under the category of secondary rules. See al-Shāṭibī, *al-Muwāfaqāt*, i, 188. Thus, marriage becomes obligatory when there is fear of falling prey to

2. *Sharṭ*: The Lawgiver may declare that a set of facts must exist or an act must take place before the cause can take effect and invoke the related *ḥukm*.[14]

3. *Māni'*: A condition or set of facts may exist that prevent the *ḥukm* from being applied even if the cause is found and the condition is met.[15]

There are some more categories of rules that are considered secondary by the jurists.

Ṣiḥḥah and *buṭlān*

An act that is obligatory, recommended, or permissible may be required to be performed in a certain manner by the Lawgiver. When

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unlawful sexual intercourse. There are other ways of understanding the cause, but we may avoid them here.

An important point to understand is about the difference between a *sabab* that is a *sabab* alone and a *sabab* that amounts to an *'illah* for a cause. The simplest way to understand this is to say that when a cause can be rationally perceived to be reason for the existence for the *ḥukm* it is an *'illah*, but when the cause is obscure for human reason and it is not possible to understand why the cause has been associated with a *ḥukm*, the cause is simply a cause and not an *'illah*. For example, human reason can comprehend why journey has been determined to be the cause for the permissibility of not fasting, but it may not understand why the month of Ramaḍān has been fixed for fasting. For further details see al-Sarakhsī, *Uṣūl*, ii, 301.

[14]The existence of a condition indicates the existence of another thing, but the absence of a condition does not necessarily indicate the absence of the thing. In its technical sense, however, it implies a necessary indication for a *ḥukm*. Ablution is a condition for prayer and the presence of witnesses a condition for the marriage contract. The meaning of *sharṭ* is understood by distinguishing its meaning from other signs related to a *ḥukm*. Thus, a *ḥukm* is related to its cause. It is established by its *'illah*. And, it is brought to fulfilment by its *sharṭ*. The *sharṭ* is different from the *sabab* insofar as the absence of the cause indicates the absence of the *ḥukm*, but the absence of the *sharṭ* does not indicate the absence of the *ḥukm*. The condition differs from the *rukn* (essential element) also, because the element is a part of the thing to which it is related, while the condition is an external factor. Thus, *rukū'* in prayer is a part of the prayer, but ablution is a condition and is not part of the prayer itself. For additional details refer to al-Sarakhsī's book referred to above for the *sabab* at page 302–303 of volume 2.

[15]The obstacle or *māni'* is a factor whose existence indicates the absence of a *ḥukm* or its *sabab*. This implies that an obstacle is of two types. The first type negates the *ḥukm* or prevents it from coming into operation, like the negation of the *ḥukm* of retaliation when the accused is the father of the victim. The other type is the obstacle that affects the cause and prevents it from coming into being. The majority of the obstacles are of this type.

the act is performed properly it is deemed as valid (*ṣaḥīḥ*) otherwise it is null and void (*bāṭil*). Here too the Ḥanafites add another category called irregular or vitiated (*fāsid*). Such an act can become valid if the cause of the irregularity is removed, otherwise it stays suspended. It may, however, have some legal effects.

5.2.1. *'Azīmah* and *rukhṣah*

The Lawgiver may indicate that one *ḥukm* is to be considered as an obligation imposed initially as a general rule (*'azīmah*). This may be followed by another rule that is an exemption (*rukhṣah*) from the general rule. The drinking of wine is prohibited as a general rule. In cases of duress (*iḍṭirār*), however, one is allowed to consume it, if it saves one from dying of thirst. According to some jurists, the entire law may be classified into general rules and related exemptions. This division has important methodological consequences and helps the jurist achieve analytical consistency. One important significance is that analogy (*qiyās*) cannot proceed from an exemption, it must be based on a general rule. This provision, considered with other strict conditions, further narrows down the operation of *qiyās*.

5.3. The purpose of the classification

The primary purpose for Muslim jurists in classifying the *ḥukm shar'ī* into obligation-creating or primary rules and into declaratory or secondary rules was to show that law is not merely the command of the Lawgiver; it is much more. I have stated earlier that Austin defined law as a command of the sovereign, for which he has been criticized by H.L.A. Hart. Hart maintains that Austin's definition fails to explain the existence of power conferring rules, which are equally a part of law, but they cannot be explained as commands. The definition provided by Muslim jurists for the *ḥukm shar'ī* is much wider than Austin's definition and thereby overcomes such objections.

In addition to this, the classification helps us understand how the primary and secondary rules, that is, the *taklīfī* and *waḍ'ī* rules interact to create obligations and determine the operation of law. This aspect of the classification will be explained in what follows.

Chapter 6

The Act and the Subject

The *ḥukm shar'ī*, as stated, has four elements, which interact with each other to give rise to liability and to the obligation to obey the law. The four elements of the *ḥukm* or a rule of law in the Islamic legal system are: the Lawgiver (*Ḥākim*); the *ḥukm* or the relevant law; the act to which the *ḥukm* is related (*maḥkūm fih*, also referred to as *maḥkūm bih*); and the subject who performs the act (*maḥkūm 'alayh*), that is, the person who is under an obligation to obey the law.

We have already discussed the topics relevant to the first two elements. The third element has also been referred to within the discussion of the classification of laws. In this chapter, we will first briefly examine the third element and then deal at some length with the fourth. The interaction of the four elements, or the union of primary and secondary rules, will be taken up in the next chapter.

6.1. The nature of the act (*maḥkūm fih*)

The *maḥkūm fih* is the act to which the *ḥukm* is related. If the communication from Allāh is related to this act by way of *taklīf*, that is, when it creates an obligation, the act is always the act of the subject. If the communication (*khiṭāb*) is related to an act by way of declaration, that is, through a secondary rule, the act may not be the act of the subject, but is indirectly related to it. For example, when there is a command to pay the *zakāh*, the obligation it creates is linked to the act of the subject. On the other hand, when there is a command to fix the minimum *niṣāb* for *zakāh*, there is an obligation to obey a secondary rule (*ḥukm waḍ'ī*), which is in the nature of a declaration supporting the imposition of *zakāh*.

Muslim jurists discuss the *maḥkūm fih* from two aspects: the conditions of *taklīf* and the nature of the act.

6.1.1. The conditions of obligation (*taklīf*)

The first condition for the creation of an obligation is that the subject must be asked to perform a known act. There is no obligation to perform an unknown or uncertain act. The reason is that the subject has to conceive the act in his mind and formulate an intention to perform it. There is a tradition to the effect that the performance of acts is determined by the nature of the intention. Knowledge of the subject about the act here implies actual knowledge or at least potential knowledge, that is, he should either be aware of the nature of the act or be in a position to find out about it either directly or indirectly. For knowledge about the nature of the act, the existence of the subject within the Islamic territory (*dār al-Islām*) is considered sufficient. Thus, the rule within the *dār al-Islām* is the same as that in law: "ignorance of law is no excuse even in a layman." Islamic law, however, makes an exception in the cases of *shubhah fī al-dalīl* (doubt in the case of conflicting evidences). We shall have occasion to explain this later.

The second condition is that the act should be such that it can be performed by the subject; it should not be an impossible act. The purpose of creating an obligation is to command the obedience of the subject. If the subject is not able to perform the act, the creation of the obligation becomes futile. This condition is split up into two sub-conditions: there is no obligation to perform an impossible act; and the performance of the act should be dependent on the will of the subject. The former case is obvious. The latter includes the acts that involve his inner emotions over which he may have little control. Thus, the tradition that requires the subject not to feel angry is not in the nature of an absolute command creating a binding obligation. It is more in the nature of a recommendation or an advice. The same would apply to a father loving some of his children more than the others, though he is not permitted to let this love interfere with his other legal obligations towards his children whom he is supposed to treat equally.

Ability to perform the act may be relative to the nature of the act, so what about acts in which hardship is excessive? The answer depends upon the act itself. For example, hardship involved during a journey while fasting is more than normal, and here the Lawgiver

has provided relief. In other cases, however, where the act relates to a communal or collective obligation and has to be undertaken by some, the act must be performed even with the accompanying hardship, as in the case of *jihād*. There are cases where the subject invokes the hardship himself, because of his eagerness to please the Lawgiver or for some other reason. Consider the case of the person who used to stand constantly under the sun while fasting. He was ordered to sit or stay in the shade to complete his fast. There were several other incidents like this during the period of the Prophet.

6.1.2. The nature of the act and the right involved

The nature of the act is determined by the kind of right that is associated with it. This has already been explained at some length, while discussing the classification of laws provided by al-Sarakhsī. We may recall that Islamic law is based on a system of rights. Each primary rule or the *ḥukm taklīfī* is based on a right, while the rule falling under the *ḥukm waḍ'ī* is related to the primary rule based on such a right. It is generally believed by writers that there are two kinds of rights: right of Allāh and the right of the individual. Two other categories are derived by a combination of these two rights based on the predominance of one or the other. The right of Allāh is equated by these writers with the right of the community or with matters that affect the public at large. The position taken in this book is that while the right of Allāh usually relates to matters affecting the public at large, it is not the same thing as the right of the community or the right of the ruler or the right of the state, it is distinct from all these. The attempt to equate the right of Allāh with the right of the state will confuse matters and insert inconsistencies within the law. An example is to be found in the case of *Nizam vs. the Government of Pakistan*,[1] which will be discussed later.

Thus, there are three kinds of basic rights in Islamic law: the right of Allāh, the right of the individual, and the rights of the individuals collectively or the right of the state. The right of the state is rarely mentioned by the *fuqahā'* because it covers the area of law with which they did not deal directly, the area left to the *imām*. The right of the state pertains to the flexible part of the law explained earlier. This

[1] PLD 1992 SC 595.

kind of right is sometimes designated as the right of the ruler (*ḥaqq al-sulṭān*)[2] or as the right of the state (*ḥaqq al-salṭanah*).[3]

The distinction between the right of Allāh and the right of the state is of crucial significance for understanding the structure of Islamic law. We will maintain this distinction and will attempt to explain the effect of not maintaining it wherever possible.

According to this analysis, therefore, there are the following kinds of rights:

1. The right of Allāh (*ḥaqq Allāh*).
2. The right of the individual (*ḥaqq al-'abd*).
3. The right of Allāh lying side by side with the right of the individual—with its two cases of predominance of one or the other.
4. The collective rights of the individuals or of the community, also referred to as *ḥaqq al-salṭanah* or *ḥaqq al-sulṭān*.

The significance of this classification of rights for understanding the structure of Islamic law and its classifications has already been explained in the previous chapter. The most important thing to remember, however, is that each act to which a *ḥukm* is related must be assigned a specific right or combination of rights. Each act, therefore, must be a right of Allāh, or the right of the individual, or a combination of the two. In the classification provided by jurists, the right of the *salṭanah* is not mentioned, because the further sub-classification of this right is left to the ruler. It should be obvious, however, that all acts related to *ta'zīr* offenses, to taxes other than *zakāh*, and a host of other areas will all be affected by the right of the state, as distinct from the right of Allāh. Acts affecting the the right of Allāh involve duties owed to Allāh alone, while the right of the state relates to obligations created by the state. As the causes, consequences, and conditions affecting the right of state vary with the passage of time, the *fuqahā'* saw no need to issue permanent rulings for them.

6.2. The subject (*maḥkūm 'alayh*)

The subject or the *maḥkūm 'alayh* forms the fourth element of the *ḥukm shar'ī*. He is the person whose act invokes a *ḥukm*. In legal

[2]See Ibn Rushd, *Bidāyat al-Mujtahid*, ii, 303.

[3]See al-Māwardī, *al-Aḥkām al-Sulṭāniyah*, 237–8.

parlance, he is known as the *mukallaf*. It is an essential condition for an obligation affecting this person that he have legal capacity, whether he performs the act directly or through delegation. The first requirement for this is that he be able to understand the communication creating the obligation. In addition to this, there are a large number of other conditions that must be fulfilled before the law can operate against or for a person. These conditions are all related to legal capacity, known as *ahlīyah* in juristic terminology. This topic is somewhat difficult, but very important at the same time.

6.2.1. *Ahlīyah* or legal capacity

The literal meaning of the word *ahlīyah* (أهلية) is absolute fitness or ability. When we say that a person is capable of doing something or of undertaking some work, it implies that he has the ability to do so. We also say that a person is capable of doing something when we mean that the accomplishment of that task would be expected of him.

Some jurists used the word in its literal sense to convey the legal or technical meaning. The majority of the jurists, however, employ the term in a restricted sense. This use associates it with the concept of rights that underlies all laws. Thus, they define *ahlīyah* as "the ability or fitness to acquire rights and exercise them and to accept duties and perform them." This definition indicates two types of capacity. These are called *ahlīyat al-wujūb* and *ahlīyat al-adā'* or the capacity for acquisition (of rights) and the capacity for execution.

Capacity for acquisition enables a person to acquire both rights and obligations, while capacity for execution gives him the ability to exercise such rights and perform his duties. We may now examine these two types of legal capacity in some detail.

Capacity for acquisition or *ahlīyat al-wujūb*

Ahlīyat al-wujūb is defined as the ability of a human being to acquire rights and obligations. In the opinion of some jurists, there is no difference between the term *dhimmah* (ذمّة) and the term *ahlīyat al-wujūb*. They maintain that *dhimmah* is also defined as the ability to acquire rights and obligations. The majority of the jurists, however, make a distinction between these two terms, and consider *dhimmah* as an imaginary container or vessel that holds both the capacity for acquisition and the capacity for execution. It is the location or

place of residence for the two kinds of capacity. In short, *dhimmah* is the balance-sheet of a person showing his assets and liabilities, in terms of his rights and obligations. *Dhimmah* is considered a requisite condition for the existence of the capacity for acquisition.

A closer examination reveals that the term *dhimmah* corresponds exactly with the term *personality* in the law. A slave in early Roman law was a "person," because he was a human being, but he had no "personality," which was an attribute assigned by the law.[4] It was personality that enabled the person to acquire rights and duties. Slaves were, therefore, considered chattel (*'urūḍ*). In Islamic law, *dhimmah* is deemed a requisite condition for the existence of *ahlīyah*. According to al-Sarakhsī, *dhimmah* is the "trust" that was offered to the mountains, but they refused; Man accepted it.

The *manāṭ* of the capacity for acquisition. *Manāṭ* is a thing from which another thing is suspended. The *manāṭ* or basis for the existence of the capacity for acquisition is the attribute of being a human. There is complete agreement among jurists that this form of capacity is possessed by each human being irrespective of his being a *mukallaf*.

Kinds of capacity for acquisition. Capacity for acquisition may not be complete or may be deficient in some respects. In such a case the law would classify it as defective capacity. The jurists use different terms to differentiate between the kinds of this capacity. For the sake of convenience we may follow the terms used by them.

Capacity for acquisition is first of two kinds: complete capacity and deficient capacity. Complete capacity for acquisition is found in a human being after his birth. This makes him eligible for the acquisition of all kinds of rights and obligations. Deficient or incomplete capacity is established for an unborn child or the fetus (*janīn*). Deficient capacity implies that only some rights are established for the *janīn* and no obligations are imposed on it. The reason is that the *janīn* is considered part of the mother in some respects. Thus, it is set free with the mother and is also sold as a part of her. An independent personality is, therefore, not assigned to it. In other respects,

[4] Some modern Muslim writers, particularly those from the Arab countries, equate *ahlīyat al-wujūb* with the concept of personality in the law. This, in our view, is incorrect. It is the concept of *dhimmah* that is similar to the concept of personality.

the *janīn* enjoys a separate life and is preparing for separation from the womb. Its personality is, therefore, considered deficient or incomplete. By virtue of this deficient capacity, the *janīn* acquires certain rights: freedom from slavery, inheritance, bequest, and parentage. On the other hand, the *janīn* cannot be made liable for the satisfaction of rights owed to others. A purchase made by the would-be *walī* (guardian) on behalf of the *janīn* cannot make the *janīn* liable for the payment of the price. Likewise, the maintenance of close relatives and the membership of the *'āqilah* cannot be enforced against the *janīn*. Once the child is born, these rights can be enforced against it, but not when the obligations were acquired during the gestation period.

A deficient capacity for acquisition is also assigned to a dead man or to a corpse. Thus, amounts due on account of debts, bequest, and funeral expenses are taken from the wealth of the dead man. In law, the estate of the deceased person is assigned some kind of intermediary status for this purpose, but this status is not the same as a fictitious personality. Muslim jurists do not permit the acquisition of new rights for the dead man, except those that are extensions of acts initiated while the person was alive; these are credited to his *dhimmah*. For example, if a person had thrown a net into the water immediately before his death, the fish caught in the net after the person's death belong to him. Likewise, if he had dug a pit before his death with the intention of trapping someone in it, then the *diyah* due as a result of someone falling in it is to be recovered from such a person's property. Further, any compensation due for property destroyed by acts commencing before his death shall be recovered from his property.

Capacity of a fictitious person. We have seen above that Muslim jurists hold *dhimmah* to be the basis for capacity for acquisition and further determine that *dhimmah* is an attribute assigned to human beings, and which entitles them to acquire rights and obligations. On this assumption, capacity for acquisition cannot be assigned to a thing other than a living human being, nor have these earlier jurists ever acknowledged the existence of *dhimmah* or capacity for anything non-human. In fact, they have expressly denied such a possibility.

Modern Muslim writers, on the other hand, being faced with the need to acknowledge the existence of a fictitious personality, as it

forms the basis of the present socio-legal structure, have claimed that such a concept does exist in Islamic law. They rely for this on instances like *waqf*, *bayt al-māl*, and the estate of the deceased. These assertions seem to be misplaced. Islamic law as expounded by the jurists does not acknowledge the concept of a fictitious person. It will be found to clash with the provisions of this law, whether the area is that of contracts, *ḥudūd*, or constitutional law. In other words, the idea of a fictitious person is incompatible with Islamic law as expounded by the jurists. Let me show this by one example. Muslim jurists insist that in the offense of *sariqah* (theft) liable to *ḥadd* is operative where the property is owned by someone. The question arises as to mosques, or to the *bayt al-māl*, whether *ḥadd* can be awarded in these cases. The former is considered to be property belonging to Allāh, while the latter is joint property in which the thief is deemed to have a potential share. The *Ḥudūd* Ordinance pertaining to theft issued in Pakistan in 1979 goes against the unanimous opinion of the jurists and considers possession of stolen property sufficient for awarding *ḥadd*, the condition of ownership deemed essential by the jurists is excluded. This enables the awarding of *ḥadd* to persons who have stolen property owned by fictitious persons.

The truth is that the concept of a fictitious person can only operate within the flexible sphere of the law, which has been described earlier and will be referred to again in a later chapter. The fixed part of the law does not need this concept and will reject it. If this concept is thrust upon the fixed part, a number of inconsistencies may develop in the law. The case of the flexible sphere is different. The *imām* can introduce the concept of a juristic person within the flexible sphere, but this should not affect the law operative in the fixed part.

We may raise a question here about the head of state. The office of the head of state is a juristic person, but is it compatible with Islamic law? The answer is left as an exercise for the reader.

Legal effects of the capacity for acquisition. The existence or proof of rights and obligations against the *dhimmah* of a subject is not an end in itself; the Lawgiver is concerned more with the exercise of rights and the fulfillment of obligations. There is no difficulty in such exercise or fulfillment when the subject enjoys full legal capacity. In addition to this, the *sharī'ah* permits the exercise of rights and the meeting of obligations in several other cases, such as the following:

1. **Capacity of the *janīn*.** Rights established for the unborn child are such that they do not require acceptance. Likewise, obligations and duties are not established against the unborn child, because there is no question of their performance.

2. ***Ṣabī*.** A child possesses a complete capacity for acquisition of rights and obligations, but until a child attains the age of actual or legal puberty, he lacks the capacity for execution (أهلية الأداء). To facilitate matters, this child is made liable by the *sharī'ah* only for those obligations that he can meet. These are listed below:

   - Pure financial transactions are established against the *dhimmah* of the *ṣabī*. Though he cannot meet them personally due to the absence of the capacity for execution, the Lawgiver allows his *walī* (guardian) to stand in his place and represent him. The *ṣabī* is also liable for any damage caused to another's property, and for the maintenance of his wives and near relatives. He is also liable, except in the opinion of the Ḥanafī school, for the payment of *zakāt*.
   - Criminal liability does not exist in the case of a person who has not attained puberty, because he is not a *mukallaf*, and the *walī* cannot stand in his place for criminal offenses: punishments being deterrents for the offender himself and not for those who represent them. This, however, holds true as far as *ḥudūd* and *qiṣāṣ* penalties are concerned; a child over seven is liable for some suitable form of *ta'zīr*.
   - The *'ibādāt* are not obligatory on the *ṣabī*, as he does not possess the capacity for execution.

3. **Cases of imperfect capacity for acquisition.** Capacity for execution may be perfect or imperfect. Imperfect capacity is attributed to women and slaves. The slave does not possess the right of ownership, but he does have a capacity for acquiring obligations pertaining to *'ibādāt*, and for criminal offenses.[5] A

[5]Some might observe that slavery no longer exists, so why do we have to study examples that mention slaves? The answer is that a number of legal principles explained by the jurists may fall under this topic. To understand these principles,

woman, on the other hand, is said to possess an imperfect capacity for acquisition. Those who hold this view deny her the right to be the head of state, the right to be a *qāḍī* (judge), and the right to testify in cases being tried under *ḥudūd* and *qiṣāṣ* provisions. In addition to this, she does not have the right to divorce, like the right given to a man, she is given a share in inheritance that is equal to half the share of male heirs, and the *diyah* paid in compensation of her death is half that of a man. These provisions have led certain Orientalists, like Joseph Schacht, to observe that in Islamic law "a woman is half a man." Women who are struggling for the emancipation of women and the acceptance of their rights in Muslim countries, whether or not they are influenced by the writings of the Orientalists, have objected seriously to such a status granted to them. Demanding equality with men, they maintain that the status of women should be the same as that of men, by which they mean that their legal capacity should not be considered imperfect or deficient in any way. The purpose here is not to argue for one side or the other, but to identify the legal issues involved. Reasons or solutions will become obvious once these issues are grasped.

The most important issue appears to be that of the evidence of women. This is split into two sub-issues. The first is whether the evidence of women is excluded by the texts of the Qur'ān and *Sunnah* in cases of *ḥudūd*? The usual answer given in reply is that the evidence of women is excluded in such cases on the basis of the *Sunnah*, which is also a source of law. These are cases involving the right of Allāh. The approach to this issue is that somehow women have been deprived of a right. This is incorrect. Evidence in these cases, and in others too, is a duty and not a right. Women have been spared the burden of this duty. The purpose is to waive the penalty of *ḥadd*, which is usually an extreme punishment, and to show mercy to the accused in an indirect way. This, perhaps, is the intention of the Lawgiver. Related to this is a misconception that the offense of rape cannot be proved and punished with the evidence of one woman. It is true that *ḥadd* cannot be awarded upon the testimony of one woman, but that does not mean that no other

the discussions of issues related to slavery are sometimes unavoidable. Some of these issues may pertain to human rights.

punishment can be awarded to the rapist on the basis of such testimony. The ruler or the state has wide powers under the doctrine of *siyāsah* to award an equally stiff penalty.

The second sub-issue is about the evidence of two women being equal to that of one man. This requirement is derived from a verse of the Qur'ān, and is supported by the *Sunnah*. The details of this problem cannot be discussed here. It is suggested, however, that the scholars of this age may try to interpret the relevant verse of the Qur'ān as implying a recommendation rather than an obligation. It should be remembered again that rendering testimony is a primarily duty and not a right, though it leads to the protection of rights.

The next issue is whether it is justified in the present times to give a woman half the share of a man. The answer is that the Qur'ān has laid down the law on this in explicit terms. The justification provided by scholars is that the Islamic legal system places a much greater financial burden on the male in terms of maintenance of his family and near ones. Such a burden has not been placed on a woman. Further, a woman is paid dower upon her marriage by the husband. This increases the financial liability for males. The argument from the other side may be that Islamic law, like any comprehensive legal system, especially one that is a complete code of life, is to be applied as a whole, in toto, not in pieces. In such a situation, is it possible for a woman who is left all alone to go to a court of law and enforcing her rights ask her brother, uncle, or cousin to support her? It is obvious that many such rights that the law provides her may not be enforceable today, as compared to other duties that have been placed upon her.

As to the question of a woman not having a right to divorce the husband, the jurists unanimously agree that such a right has not been granted to her directly. There are, however, provisions in the law like *takhyīr* and *tamlīk* through which she may be granted such a right at the time of the marriage contract, if she so desires. To explain this point, let us quote Ibn Rushd, the famous philosopher and jurist, also known as Averröes.

> Procedures that are counted among the categories of divorce, and which are considered to have specific *aḥkām*, are *takhyīr* (granting a choice) and *tamlīk* (granting possession of the right). According to Mālik there is a differ-

ence between *tamlīk* and *takhyīr* (in this context). *Tamlīk*, in his view, is the granting of a right to a woman to pronounce (her own) divorce. This may be interpreted as one repudiation or more, thus, the man is entitled to deny her the right to more than one repudiation. *Khiyār* is different from this, as far as it implies the execution of divorce leading to the termination of the nuptial tie, unless it is a restricted form of *takhyīr*, like his saying to her: "choose for yourself, a single repudiation, or two repudiations." In the case of unrestricted choice, according to Mālik, she only has the choice to choose her husband or opt for irrevocable separation from him through the pronouncement of three repudiations, but she is not entitled to choose a single repudiation.

The right under *tamlīk*, according to him (Mālik) in one narration, is not annulled even if it is not exercised by the authorized woman for a long period of time, or till they part from the session. According to a second narration from him, the right under *tamlīk* stays with her till she revokes it or exercises it through repudiation. The difference, in Mālik's view, between *tamlīk* and granting of a power of attorney (*tawkīl*) to her to exercise repudiation is that in an agency he can revoke the power of attorney before she exercises such power, but in *tamlīk* he does not have that right. Al-Shāfi'ī said that statements like, "choose yourself" or "your affair is in your hands" mean the same thing, but this does not amount to granting the right of repudiation, unless he intends it to be so, and whatever he intends takes effect: if he intends it to be a single repudiation it is so and if he intends three repudiations, then, that will be the case. He is entitled, according to al-Shāfi'ī, to deny her the right of repudiation itself, or restrict her with respect to the number (of repudiations) in both *takhyīr* and *tamlīk*.

According to him (al-Shāfi'ī), if she divorces herself it amounts to a revocable divorce, which is also the case according to Mālik in *tamlīk*. Abū Ḥanīfah and his disciples said that granting a choice does not amount to divorce, but if she divorces herself even through a single repudiation in *tamlīk*, it amounts to an irrevocable divorce. Al-Thawrī said that *khiyār* and *tamlīk* are the same thing and there is no difference between them.

It is said that the acceptable statement is hers about the number of repudiations in *tamlīk* and the husband cannot rebut her statement. This opinion is related from 'Alī and Ibn al-Musayyib, and it was also adopted by al-Zuhrī and

'Aṭā'. It is said that the woman, in the case of *tamlīk* is not entitled to divorce herself, except through a single repudiation. This is related from Ibn 'Abbās and 'Umar, may Allāh be pleased with them both. It is reported that a man came to Ibn Mas'ūd and said, "There was between me and my wife, the kind of relationship that exists between people (normally). She said (to me), 'Had the power that you possess over me, been in my hands, you would have known how I would treat you.' I said to her, 'In that case, the authority that I possess over you is now in your hands.' She said, 'Then you are divorced thrice.'" Ibn Mas'ūd replied, "I consider this to be a single repudiation, and you have a right over her as long as she is in her *'iddah*; I will, however, consult with the *Amīr al-Mu'minīn*, 'Umar." He then met 'Umar and related the case to him. 'Umar said, "Allāh has given men what He did. If they desire to place in the hands of women, what Allāh has placed in their authority, then, dust is in their jaws. How did you decide it?" He said, "I held it to be a single repudiation, and that he still has a right over her." 'Umar said, "I hold it to be the same, and if you had decided it differently I would have considered you to be wrong."

It is said that *tamlīk* has no legal force, as it is not permitted that the authority placed in the hands of a man be passed on to the authority of a woman by the act of the assigner. Similarly in the case of *takhyīr*, which is the opinion of Abū Muḥammad ibn Ḥazm. Mālik's opinion about the woman authorized under *tamlīk* is that she has a choice between divorce and holding fast to the nuptial tie as long as she is in the session (of assignment), which is also the opinion of al-Shāfi'ī, Abū Ḥanīfah, al-Awzā'ī, and a group of other jurists of the provinces. According to al-Shāfi'ī, *tamlīk* is like agency (*wakālah*), when he intends divorce, and he has the right to retract it whenever he likes, as long as divorce has not come into effect.

The majority decided in favor of *tamlīk* and *takhyīr* and deemed it to be a provision for women, because of what is established about the *takhyīr* of the Messenger of Allāh (God's peace and blessings be upon him) in the case of his wives. 'Ā'ishah said "The Messenger of Allāh (God's peace and blessings be upon him) granted us a choice, and we chose him so it did not amount to a divorce." The Ẓāhirites, however, maintain that the meaning of this would be that if they had opted for themselves, the Messenger of Allāh (God's peace and blessings be upon him) would have divorced them, not that they could divorce

themselves by the very option of divorce.

The majority also maintained the validity of *takhyīr* and *tamlīk*, and permitted the granting of these rights to women as the implication of customary usage is that one who transfers the ownership of a right to another, to the effect that he may exercise it or he may not, has granted that person a choice. Mālik, however, is of the opinion that his saying, "choose me or choose yourself," would amount, in legal usage, to a choice for irrevocable repudiation within the meaning of the Messenger of Allāh's option for his wives, and the meaning implied by this option is of irrevocability.

Mālik was of the view, in the case of *tamlīk*, that the husband's statement, to the extent that he did not intend divorce thereby, is not to be accepted (in case of dispute) when he makes such a claim, for it is an authorization clear in its meaning about placing of the right of divorce in her hands. Al-Shāfi'ī, because the words used are not explicit for him, attached weight to intention; so the basis for the dispute is whether weight should be attached to the apparent meaning of the text or to intention. He did the same in *takhyīr*.

They agreed that he has the right to deny her the (maximum) number (of repudiations), that is, through the implication of the word *tamlīk*, as it does not carry an additional meaning beyond the literal. Mālik and al-Shāfi'ī held that if she divorced herself through his assignment of authority to her, with a single repudiation, it would be a revocable divorce, as divorce in legal usage is *talāq al-sunnah*. Abū Ḥanīfah held that it is irrevocable, for if it is revocable it is of no use in view of what she expects from it and also in view of what he intends thereby.

Those who maintained that she has the right to divorce herself thrice through *tamlīk*, and that the husband does not have the right to deny her this, because the meaning of *tamlīk*, according to them, considers all the authority possessed by the man to have passed on to the woman, said that she has a choice in the number of repudiations she pronounces. Those who deemed *tamlīk* to be a single repudiation or a choice (restricted to it), held that it is the minimum (number) to which the term can be applied, as a precaution for the sake of men, because the underlying reason for granting the authority of divorce to men is the weaker rationality of women, their being normally overpowered by emotions, and their inclination to disturb normal life.

The majority of the jurists maintained that if the woman chooses her husband, it (her choice) cannot revert to divorce, because of 'Ā'ishah's preceding tradition. It is, however, related from al-Ḥasan al-Baṣrī that if she chooses her husband it amounts to a single repudiation; but if she chooses herself it amounts to a triple-repudiation.

In summation of the issue, we find that there is disagreement on three points. First, that divorce does not result from either category (*tamlīk* or *takhyīr*). Second, that both categories cause separation (divorce) between the two (husband and wife). Third, that there is a distinction between *takhyīr* and *tamlīk* with respect to the right acquired by the woman; that is, through *takhyīr* she possesses the right to an irrevocable divorce, and through *tamlīk* what is less than that. When we concede that it is an irrevocable divorce, it is said that she possesses a single repudiation, and it is said that she possesses a triple-repudiation; when it is conceded that she possesses a single repudiation, it is said that it leads to a revocable divorce, and it is said to an irrevocable divorce.

The words that a woman pronounces in *takhyīr* and *tamlīk* refer to the *ḥukm* of words with which divorce is pronounced insofar as they are explicit, indirect, or equivocal. The details will come up in the discussion of words used for divorce.[6]

In our view, in the case of *diyah*, there is no restriction on the *imām* to provide the second half of the *diyah* under his powers of *siyāsah*. This way the heirs of the deceased woman will get half the amount as regular *diyah* and the other half as additional compensation. There is no doubt about the fact that women are working today and are equally efficient working members of the society. In fact, some of them may be earning more than men. In this issue, it is not the right of a woman that is involved, because the right to *diyah* belongs to the heirs, but it is a question of her status. The proposed law of *qiṣāṣ* and *diyah* goes a step further and makes no distinction between a male and female for purposes of valuation of *diyah*.

The reason why a woman cannot become a *qāḍī* or judge is linked to the question of evidence. A *qāḍī* can only hear cases in which he can also be an eligible witness. This is a qualification for the *qāḍī*. As a woman cannot be a witness in cases of

[6] Ibn Rushd, *Bidāyat al-Mujtahid*, ii, 53–55

ḥadd, she cannot be a *qāḍī* for hearing the cases and passing sentence. The question of being a head of state is also similar. The primary duty of a head of state is the implementation of *ḥudūd* (*iqāmat al-ḥudūd*), which again requires the qualification of a witness for such cases. A woman is, therefore, considered ineligible for the job. In Pakistan, women judges today are deciding cases under the *ḥudūd* laws.

Capacity for execution or *ahlīyat al-adā'*

Capacity for execution (أهلية الأداء) is defined as the "capability of a human being to issue statements and perform acts to which the Lawgiver has assigned certain legal effects." This kind of capacity is considered to be of three kinds:

1. **Capacity for the *khiṭāb jinā'ī*.** This is the capacity for the issuance of words and the performance of acts, the legal effects of which are "temporal punishments." In other words, whoever possesses such a capacity can acquire through his statements and deeds a liability for the offenses constituted by such statements or acts. This kind of capacity is known as the capacity for criminal liability or the ability to comprehend the *khiṭāb jinā'ī*.

2. **Capacity for the *khiṭāb* of *'ibādāt*.** It is the capacity for the issuance of words and performance of deeds the legal effects of which are produced in the shape of rewards or *thawāb* in the Hereafter, and also the freedom of the *dhimmah* in the present world. This is termed as the capacity for *'ibādāt* or the capacity for the *khiṭāb* of *'ibādāt*.

3. **Capacity for the *khiṭāb* of *mu'āmalāt*.** It is the capacity for the issuance of words and the performance of deeds the legal effects of which are the exercise of rights and the fulfillment of obligations for contracts and other transactions. It may be called the capacity for transactions or the capacity for the *khiṭāb* of *mu'āmalāt*.

The reason for separating the capacity for execution into these three types is to indicate that a person may, for example, be in possession of the capacity for transactions, but not the capacity for punishments. To put it differently, all three kinds of capacity may be found

in the person who is sane and a major, but one or more of these may be lacking in other persons.

The *manāṭ* of *ahlīyat al-adā'*. The *manāṭ* or basis of the capacity for execution is *'aql* (intellect) and (*rushd*) discretion. *'Aql* here implies the full development of the mental faculty. As there is no definitive method for checking whether this faculty is fully developed, the Lawgiver has associated it with *bulūgh* or puberty. Thus, a pubescent person is assumed to possess *'aql* necessary for the existence of the capacity for execution. This presumption, however, is rebuttable, and if it is proved that though a person has attained puberty, he does not yet possess *'aql*, capacity for execution cannot be assigned to such a person. This is the view of the majority of the jurists.

The Ḥanafīs, on the other hand, acknowledge a deficient capacity for execution for purposes of some transactions for a person who has attained a degree of discretion, even if his mental faculties are not yet fully developed. Thus, a minor (*ṣabī*) who possesses discretion may be assigned such a capacity, for the *khiṭāb* of *mu'āmalāt*. Again, there is no way here of determining whether the minor has attained discretion. The Ḥanafī jurists have, therefore, fixed the minimum age of seven years for assigning such a capacity; anyone over seven years of age who has not yet attained puberty may be assigned such a capacity.

Deficient capacity is also assigned by the Ḥanafīs to a person who has attained puberty, but is not fully developed mentally, like the *ma'tūh* (mentally retarded; idiot).

Complete and deficient capacity for execution. Capacity for execution is, therefore, divided by the Ḥanafīs into two kinds: complete and deficient.

Deficient capacity is assigned to a non-pubescent who possesses some discretion, or to a *ma'tūh* who has attained puberty yet lacks complete mental development.

The person who possesses deficient capacity is not subject to the *khiṭāb jinā'ī*; he cannot, therefore, be held criminally liable. The minor, however, is subjected to *ta'dīb*—the reason being that the *khiṭāb jinā'ī* is applicable to that person alone who comprehends the *khiṭāb* fully.

With respect to the *'ibādāt*, there are detailed discussions whether the *khiṭāb* is addressed to the *ṣabī* and *ma'tūh* by way of *nadb* (recommendation) or *khiyār* (choice), or whether it is addressed to them at all. There is no dispute that there is reward (*thawāb*) for such a person for the performance of the *'ibādāt*.

We are concerned here with the capacity of such a person for the purpose of transactions. The Ḥanafīs divide transactions into three types for this purpose:

1. **Purely beneficial transactions.** The transactions falling under this category are the acceptance of a gift or of *ṣadaqah*. These are allowed to the person who has not attained puberty, but who can discriminate and has been permitted by his *walī* (guardian) to exercise such acceptance.

2. **Purely harmful transactions.** The granting of divorce, manumission (*'itq*), charity (*ṣadaqah*), loan (*qarḍ*), and gift (*hibah*), as well as the making of a trust (*waqf*) and bequest (*waṣiyah*) are considered transactions resulting in pure financial loss. These are not permitted to the *ṣabi mumayyiz* (discriminating minor).

3. **Transactions vacillating between profit and loss.** Sale, hire, parthership, and other such transactions are considered valid if ratified by the *walī*.

The deficient capacity granted to the discriminating minor by the Ḥanafīs is also granted to the *ma'tūh*. The majority of the jurists (*jumhūr*) oppose the Ḥanafīs and refuse to acknowledge any kind of capacity for the discriminating minor. They maintain that the communication (*khiṭāb*) is not directed toward such a minor at all, and it is of no consequence whether the transactions are beneficial or harmful. In practice, however, we find young boys minding stores on behalf of their fathers, and often handling the transactions exceptionally well.

Complete capacity. Complete capacity is established for a human being when he or she attains full mental development, and acquires the ability to discriminate. This stage is associated with the external standard of puberty. The physical signs indicating the attainment of puberty are the commencement of ejaculation in a male and menstruation in a female. In the absence of these signs,

puberty is presumed at the age of fifteen in both males and females according to the majority of the jurists, and at the age of eighteen for males and seventeen for females according to Abū Ḥanīfah.

Attaining *bulūgh* (puberty) alone is not sufficient, however, for a person to acquire complete capacity for execution. In addition to puberty, the possession of *rushd* (discrimination; maturity of actions) is stipulated as well. The *dalīl*, or legal evidence, for this is the verse of the Qur'ān:

> Make trial of orphans until they reach the age of marriage; then if ye find sound judgement in them, release their property to them; but consume it not wastefully, nor in haste against their growing up.[7]

This verse lays down clearly that there are two conditions that must be fulfilled before the wealth of orphans can be handed over to them. These are *bulūgh al-nikāḥ* and *rushd*.

The term *rushd*, according to the majority, signifies the handling of financial matters in accordance with the dictates of reason. The *rashīd* is a person who can identify avenues of profit as well as loss, and act accordingly to preserve his wealth. *Rushd* is the opposite of *safah* (foolishness), which implies waste and prodigality. Shāfi'ī jurists define *rushd* as maturity of actions in matters of finance as well as of *dīn*. In their view, a person who has attained puberty and is adept in dealing with financial matters cannot be called *rashīd*, unless he obeys the *aḥkām* of the *sharī'ah* in matters of *'ibādāt* as well.

A person, then, is eligible for taking over his wealth if he is both a *bāligh* and a *rashīd*. This is the general view. Abū Ḥanīfah, however, maintains that a person who attains the age of twenty-five years, must be delivered his property irrespective of his attaining *rushd*. In addition to this, he maintains that if a person attains *bulūgh* and *rushd* and is given his property, but subsequently loses his *rushd*, while yet under twenty-five, he cannot be subjected to interdiction (*ḥajr*). The majority of the jurists (*jumhūr*) subject a person to interdiction if he has not attained *rushd* or even when he loses it subsequently, irrespective of his age.

On attaining complete capacity, an individual comes within the purview of the different kinds of *khiṭāb*. He, therefore, becomes liable

[7] Qur'ān 4 : 6

to punishments because of the *khiṭāb jināʾī* being directed towards him, just as he becomes liable because of the *khiṭāb* of transactions and *ibādāt*.

The stages of the capacity for execution. The conditions laid down by the Ḥanafī jurists indicate that there are three stages through which an individual passes with respect to his capacity for execution. These are:

1. The first stage is from birth till the attainment of discretion, which is considered to be the age of seven years. During this period, the child is assumed to lack *'aql* and discretion completely, and is ineligible for the assignment of a capacity for execution.

2. The second stage commences from the age of seven and continues up to actual puberty or the legal age of puberty, whichever is earlier. Deficient capacity for execution is normally assigned during this stage, as the individual possesses a certain amount of *'aql* and discretion.

3. The final stage commences from actual physical puberty or the legal age determined for it. On reaching this age the individual is assigned complete capacity for execution, and becomes eligible for each kind of *khiṭāb*. An exception arises in the case of *safah* that has already been explained, and the individual may be placed under interdiction for some time.

6.2.2. Causes of defective capacity

The causes affecting capacity are found in those factors that prevent *capacity for acquisition* and *capacity for execution* from taking full effect. The existence of these factors may result in the total absence of capacity or in deficient or incomplete capacity. For purposes of the present discussion, we may refer to all such forms as defective capacity.

The *manāṭ* for capacity for acquisition, as we have said, is *insāniyah*, and it is death alone that can cause a change in this kind of capacity. We have seen, however, that under certain circumstances a corpse may have such a capacity. *'Aql* and *rushd*, on the other hand, are the bases for capacity for execution, and each factor that has the power to influence and affect the normal functioning of

of the human mind can become a cause for defective capacity. Muslim jurists discuss the causes of defective capacity under the conditions of *taklīf*. Thus, they include within this discussion the knowledge of the *aḥkām* as well as the ability of the subject to perform acts. This shows that many things that cannot be properly considered as causes of defective capacity on the basis of the criteria provided above are included within this discussion. These will be excluded from the present discussion. This does not mean that those discussions are not important. As an example, we may mention the rule that "ignorance of law is no excuse even in a layman." This rule is true even for Islamic law, but there may be cases where some exceptions are made. Thus, the subject may be confused about the ruling on a an issue, because there are more than one opinion based on conflicting evidences. Such cases fall under the category of *shubhah fī al-dalīl* or doubt as to the evidence. There are other cases that are referred to as those of *shubhah fī al-'aqd* or doubt about the legality of the contract. Today, such cases are difficult to conceive, because the law is codified and published with the authority of the state backing up a single undisputed rule. It is for this reason, perhaps, that the *ḥudūd* ordinances promulgated in Pakistan have ignored all such cases of doubt.

It is pertinent to note that many of the causes of defective capacity mentioned here will appear to the reader to be the same thing as the general defenses in criminal law, or as other grounds for waiver of liability in civil or ritual matters.

The jurists divide the causes of defective capacity into two kinds: *samāwiyah* and *muktasabah*. We may designate these as natural and acquired causes.

Natural causes of defective capacity

These are causes that are beyond the control of the subject (*mukallaf*), and result from an act of the Lawgiver and Creator. Under this heading, the jurists list ten causes: *ṣighar* (minority); *junūn* (insanity); *'atah* (idiocy); *nisyān* (forgetfulness); *nawm* (sleep); *ighmā'* (unconsciousness; fainting); *riqq* (slavery); *maraḍ* (illness); *ḥayḍ* (menstruation); *nifās* (puerperium; post-natal state of woman); and *mawt* (death). We shall discuss a few of these here, the rest are either obvious or have a greater bearing on *'ibādāt*.

Ṣighar (Minority). It is the state or condition of a human being after birth and before puberty. This, in fact, is not a cause of defective capacity or even an obstacle in its way, but a necessary stage in the growth of the human being. It is considered as a cause for noting its effect upon capacity or *ahlīyah*.

- Minority does not affect capacity for acquisition or *ahlīyat al-wujūb*. All rights and obligations are acquired as their establishment requires merely a *dhimmah* and the *manāṭ* (being a human), which is the basis for the capacity for acquisition. Minority does not oppose the *manāṭ*. The jurists, therefore, maintain that the minor is liable for compensation for property destroyed by him, for goods and services bought, for maintenance of relatives, and also for *zakāt* according to some.

- Capacity for execution or *ahlīyat al-adā'* requires *'aql* for its fulfillment, and this the non-discriminating minor (*ṣabī ghayr mumayyiz*) lacks, because he does not understand the *khiṭāb*. He is, therefore, not liable for the *'ibādāt*, for financial transactions, or for punishments. The Ḥanafīs make an exception in the case of the *ṣabī mumayyiz* or one who has attained some discretion. The *'ibādāt* of such a minor are rewarded in the Hereafter, and it is a matter of controversy whether the *khiṭāb* of *targhīb* or recommendation is addressed to him. He is not liable for punishments, but financial transactions undertaken by him are valid in certain cases. Transactions that are purely harmful for such a minor, like gifting away of his property have no legal effect. Transactions that are purely beneficial or those that are evenly balanced between profit and loss are allowed, with the prior permission of the guardian or his subsequent ratification. The position of the *ṣabī mumayyiz* may be compared with the contract for necessaries by a minor under sections 11 and 68 of the Pakistan Contract Act. The freedom allowed to the *ṣabī mumayyiz* by the Ḥanafīs is much wider than that under the law.

Junūn (Insanity). *Junūn* has no effect on *ahlīyat al-wujūb*, because rights and obligations are established for and against an insane person, who is deemed liable for *itlāf* (destruction of property), payment of *diyah*, and the like. The *manat* of such a capacity is

insāniyah, and the *majnūn* is a human being. *Junun*, however, completely negates the *ahlīyat al-adā'*, because of lack of *'aql*. The insane person, therefore, has no liability for *'ibādāt* or punishments, and all his transactions are void.

***'Atah* (Idiocy).** It is a state in which a person at times speaks like a sane and normal person, while at others he is like a mad man. It is also described as a state in which a grown-up has the mind of a child. The capacity of an idiot is deemed equivalent to that of a *ṣabī mumayyiz*, who can be permitted by his guardian to undertake some transactions.

Sleep and fits of fainting. Sleep and fits of fainting have relevance for purposes of *'ibādāt*, as well as for crimes and torts. They do not affect *ahlīyat al-wujūb*, because the attribute of *insāniyah* is intact. Persons in such a condition, however, do not understand the *khiṭāb*. Their capacity to understand things is temporarily affected and prevented from normal functioning. The liability for missed *'ibādāt* lingers against such a person and these have to be performed as *qaḍā'* (delayed performance). There is no liability for punishments and transactions. If a person, while sleeping, falls on a child during sleep and kills it, there is no liability for punishment, but compensation is another matter for which there may be strict liability.[8]

Forgetfulness. This is a state in which a person is not very careful about things though he has full knowledge of them, as distinguished from sleep and fits of fainting in which such knowledge is lacking. Forgetfulness does not affect *ahlīyat al-wujūb* nor does it affect the capacity for execution. The *khiṭāb*, however, becomes operative as soon as the person remembers. Transactions undertaken by such a person are valid and enforceable against him.

***Maraḍ al-mawt* (Death-illness).** This is a condition in which the mind of a sick person is dominated by the fact that he will die because of his illness. It is of no consequence whether the person

[8]This means that loss of life has to be compensated anyway, irrespective of intention to harm. In traditional Islamic law, the burden in such cases is placed upon the *'āqilah*, which is the tribe or group with which an individual is considered to be associated.

actually dies from this illness or from something else. Two conditions must be met before an illness may be declared a death-illness:

- The deceased person must be convinced that he is approaching death, irrespective of the nature of the disease. Diseases like common colds and headaches, however, are not taken into account for such purposes. Some jurists associate other circumstances with this state, like a person on a ship that is caught in a storm, or like a person facing a death sentence.

- Death should follow such a conviction, even if it is not caused by the feared illness.

- Some jurists stipulate a third condition here by saying that death must occur within one year of the commencement of illness, because any period above this would mean that the person is accustomed to his illness and that the fear of death is remote.

Maraḍ al-mawt has no effect on the capacity for acquisition or on the capacity for execution, and it is in fact a condition of *taklīf*, because it is the capacity to perform an act that is affected here and not the capacity to understand it.

A person suffering from such an illness is prohibited from entering into transactions that are in excess of one-third of his wealth. In other words, it takes the *ḥukm* of *waṣīyah*. This condition is stipulated to protect the rights of the heirs. The reason assigned is that the rights of the heirs get linked to the estate as soon as *maraḍ al-mawt* takes hold. The Lawgiver has laid down that such rights are to come into play after the death of the person, but to protect the rights of the heirs and creditors it is assumed that death has already occurred. The justification provided is that the transactions of such a person are not those of one who wishes to live, but of one who is ready to depart.

The following rights are attached to the estate of the person suffering from *maraḍ al-mawt*:

- *Rights of creditors.* The creditors have a right prior to all, even if the debts consume all the estate.

- *Rights of beneficiaries.* The rights of beneficiaries restrict the transactions to one-third of the estate, however, amounts in excess of one-third will be valid if permitted by the heirs.

- *Rights of the heirs.* These rights are linked to the estate from the time of the commencement of illness, and any transactions undertaken[1] by the sick person will be assigned *aḥkām* as follows:

  1. *Transactions with a counter-value.* If the person suffering from death-illness concludes a contract of sale with no apparent loss in it, that is, at the market value, then the creditors or the heirs cannot have it set aside. It is to be assumed that such a sale was undertaken to fulfill his genuine needs and not with the intention to deprive his creditors or heirs. Abū Ḥanīfah maintains that if such a sale is made to one of the heirs, it is to be declared as void even if it is at market value. The two disciples of Abū Ḥanīfah, Abū Yūsuf and al-Shaybānī, maintain that the sale is valid. The difference of opinion is due to the question whether the right of the heirs is linked to the *'ayn* (substance) of the thing or to its value.
  2. *Transactions without a counter-value.* If the transaction is a *hibah, waqf, ṣadaqah,* or a sale at less than the market value, or a purchase at more than the market value, then such a transaction will be restricted to one-third of the value of the estate, after the creditors have been satisfied.

Three conditions must be fulfilled, before the rights of the creditors can come into play:

(a) That the transaction was without a counter-value or without adequate counter-value. This would cover transactions like gift, charity, *waqf,* sale at discount, or purchase at a premium.

(b) That the transaction involves the transfer of a thing (*'ayn*) itself and not its use, provided that the benefit conferred through use will terminate upon the death of the owner. Some Ḥanafīs do not consider the benefits arising from the use of a thing as *māl.* The use of land, or of a house, or of an animal are examples that explain this case. The majority (*jumhūr*) consider the use of benefits as *māl.*

(c) That the transaction must be in *a'yān* (substance of things) and not in the revenue or profit derived from them. Any assignment of profits arising from a *sharikah* or *muḍārabah* will not be affected by this condition.

Besides transactions, any admission or acknowledgement of debts by the person suffering from *maraḍ al-mawt* (death-illness) may also invoke the rights of creditors and heirs. Al-Shāfi'ī is of the opinion that acknowledgement by a person suffering from death-illness is valid and is not affected by the rights of the creditors or the heirs. The reason he assigns is that a person approaching death would normally tell the truth, even if he is a habitual liar. The Ḥanafīs, on the other hand, make a distinction between two cases:

(a) Acknowledgement of debt in favor of an heir: An acknowledgement in favor of an heir can have legal effects if the rest of the heirs permit it. This is due to the apprehension that one heir may have been preferred over the others.

(b) Acknowledgement of debt in favor of a stranger: An acknowledgement favoring a stranger is valid. These debts are called *duyūn al-maraḍ* and are to be paid after all other debts, called debts of health, have been satisfied.

The Mālikīs distinguish between cases where an allegation of a "bond of affection" can be made, that is, where a possibility of undue influence is likely. For example in the case of a wife, close relative, or friend. The basis is the bond existing between them and not the blood relationship. Ibn Rushd has the following to say, when he invokes the principle of *maṣlaḥah* to explain the issue:

> The rejection of the permissibility of marriage with the intention of the inclusion of an additional heir is an analogy based upon *maṣlaḥah*, which is not permitted according to the majority of the *fuqahā'*. Taking interests into account in a genus[9] that is remote from the genus that is desired for the establishment of the *ḥukm* according to (the principle of) *maṣlaḥah* led some jurists to the conclusion that upholding such an opinion amounts to legislating additional law, and the adoption of such an analogy dilutes the principle of submission to the *sharī'ah*, neither adding to it nor detracting from it. Yet, reluctance to pay attention to *maṣlaḥah* might cause the people to be pushed, because of a lack of precedents in this genus, toward injustice. Such interests should be brought to the scholars of the *ḥikmah* (philosophy) of the law, the learned who will not be accused of judging by it, especially nowadays when the qualified persons think that the adoption of the letter of the law (apparent

[9]Here genus refers to the genera of underlying causes.

meaning) leads to injustice. The proper methodology of the learned scholar in this should be to examine the evidence in the circumstances of the case. If such evidence indicates that he (the *marīḍ*) intends betterment through the marriage, he should not prohibit the marriage, but if it indicates that he intends harm to his heirs, he should disallow it. This is the case in many things among skills and services where the professional is faced with opposing results in what he is trying to do upon the strength of his skill, for it is not possible to lay down fixed limits for the service. This (situation) is usually faced in the profession of medicine and also in various other professions.[10]

Acquired causes of defective capacity

Acquired causes are those that are created by Man or in which human will and choice are the basic factors. Muslim jurists list seven such causes: ignorance, intoxication, jest, *safah* (folly), journey (*safar*), mistake, and coercion. We will discuss some of the important causes, noting their effects on the capacity for acquisition and on the capacity for execution.

Intoxication. Drunkenness is a state caused in a human being due to the use of an intoxicant, which temporarily suspends the proper functioning of the mental faculty.

Intoxication does not cause a change in the capacity for acquisition, as its basis is the attribute of being a human. Thus, a drunken person possesses a *dhimmah* with a complete capacity for acquisition, and he is held liable for destruction of life and property, and also for all obligations, for maintenance, and even for *zakāt*. All these duties and obligations require the existence of the capacity for acquisition alone, and intoxication does not negate it.

The basis for the capacity for execution, on the other hand, is *'aql* and discretion; these are negated in the case of the drunken person by the state of drunkenness. The *khiṭāb* is not addressed to the drunken person, because he does not comprehend it. The state of such a person is worse than that of one who is asleep, for the latter can be awakened; it is worse than that of an idiot, who may understand parts of the speech addressed to him.

[10]Ibn Rushd, *Bidāyat al-Mujtahid*, ii, 35.

The jurists agree unanimously that the *khiṭāb* is not directed toward the intoxicated person if such intoxication has been caused by the legal use of intoxicants. For example, the person who has consumed liquor without knowing what it is or when he has done so under coercion or under duress to save his life. In such cases, the *ḥukm* for this person will be the same as that of the person under a spell of fainting.

Muslim jurists disagree about the person who is intoxicated when such intoxication is caused by prohibited means. The Ḥanafīs and some other jurists do not consider such a cause to have any effect on the capacity for execution and on the understanding of the *khiṭāb*. Thus, the *'ibādāt* are established against such a person and he will be held liable for delayed performance (*qaḍā'*), along with the accompanying sin. Any transaction or acknowledgement he makes is valid and enforceable against him. He acquires criminal liability for acts committed in such a state, though he can retract his confession made in this state regarding a case of *ḥudūd*, as these are pure rights of Allāh. The argument provided by the Ḥanafīs is that intoxication is a crime and as such cannot be an excuse for waiving punishments. Further, one reason why intoxication has been prohibited is that it leads to other *khabā'ith*. Moreover, if the acts of the drunken person are to be exempted from liability, it will become a means for the commission of offenses, and for evading liability. Relying on the verse, "O ye believers, approach not prayer when you are intoxicated, until you know what you say,"[11] they maintain that it is obvious that the *khiṭāb* is addressed to the drunken person and he is expected to understand the meaning and import of the verse even when he is intoxicated. If this is not the interpretation, it would amount to saying to a person under a spell of madness, "Do not commit such an act when you are insane." It is for this reason that the drunken person is held liable for his acts.

Some jurists are of the opinion that an intoxicated person has no capacity for execution, because his *'aql* is completely impaired by the state of intoxication. They maintain that the Lawgiver has already provided a penalty for the offense of intoxication and holding him liable for his transactions as well, that is, those undertaken in such a state, would amount to punishing him twice for the same offense, a kind of double jeopardy. They argue that the verse about avoiding prayers in an intoxicated state is actually addressed to a sober person

[11] Qur'ān 4 : 43

telling him to avoid becoming intoxicated before the time of prayer, an act over which he has control, as compared to the person subject to fits of madness over which he has no control.

Modern jurists try to prefer the second opinion as it may be closer to some forms of Western law. It must be noted, however, that consuming liquor is an offense in Islamic law and it may not be so in the law.

Jest. When a person uses words without intending to convey either their primary or their secondary meanings, that is, their denotations or their connotations, he is said to speak in jest (*hazl*). Such a person may, for instance, use words employed for the contract of marriage, but does not intend the *ḥukm* (effect) of such a contract.

Speaking in jest has no effect on the capacity for acquisition; rights as well as obligations will, therefore, be acquired. The basis of *insānīyah* required for this kind of capacity is not altered by jokes.

Hazl or jest cannot negate the capacity for execution either, because such a person has not lost his intellect or discretion. Contracts, on the other hand, require consent and willingness to give rise to legal effects. The person speaking in jest does bring about the apparent form (*ṣīghah*) of the contract, but has not given his consent in reality. The Ḥanafīs, therefore, consider the transactions of such a person as invalid, except transactions like marriage, divorce, manumission, *rujū'* (retraction), and the like. This is based on the tradition that says, "Three things intended seriously are taken seriously, and if intended in jest are also taken seriously: marriage, divorce, and the freeing of a slave." Some jurists do not maintain this exemption, and treat all statements made in jest as being ineffective. The Shāfi'īs maintain that statements made in jest are to be considered valid at all times, because the person has brought about the cause—the *ṣīghah* (form)—and must, therefore, bear the consequences.

Folly (*Safah*). This defect concerns financial transactions, that is, transactions undertaken carelessly and in a manner that a prudent person is likely to avoid. The result is foolish waste and squandering of property.

The tendency in a person to waste his property affects neither his capacity for acquisition nor his capacity for execution. The effect of *safah* is that a person, who has attained puberty, is subjected to interdiction (*ḥajr*) till such time that he mends his ways. This view is upheld by the majority. It is based upon the necessity (*ḍarūrah*) of

preserving his wealth, because preservation of wealth is an acknowledged purpose of the law. Abū Ḥanīfah maintains that interdiction can last only till the age of twenty-five, after which the property of the individual is to be delivered to him, because at this age the individual is to be preferred over property.

Coercion and duress (*Ikrāh*). *Ikrāh* is a situation in which one is forced to do something without his willingness. It has no effect either on the capacity for acquisition or the capacity for execution, because this state does not affect life or reason and discretion. It does, however, negate free consent and willingness.

Effect on free will. The jurists disagree about the extent to which *ikrāh* can affect free will. The views of these jurists may be classified into two opinions:

1. The first opinion maintains that *ikrāh* is an obstacle in the way of *taklīf* (creation of an obligation). Thus, the *khiṭāb* is not directed toward a person under coercion or under duress, because this person is prevented from understanding the *khiṭāb*. Among those who hold this opinion are Shāfi'ī jurists, who maintain that free will is a condition of *taklīf*. *Ikrāh*, according to the Shāfi'īs, arises under a threat of death, hurt, perpetual confinement, and the like. It does not arise for causes of a lesser gravity, like a threat to property. *Ikrāh*, defined this way, is in their view, divided into two kinds:
   a. *Justified coercion*. This is like the order of a *qāḍī* directing a debtor to pay his debts to his creditors, or his command to a man to divorce his wife after the passage of the period of *īlā'*, as required by Shāfi'ī law. This kind of *ikrāh* does not affect the free will of a person, as the duty is imposed by the Lawgiver. Thus, any transaction in property undertaken under coercion for paying off creditors shall not be declared void.
   b. *Unjustified coercion*. Coercion without justification is again of two types. The first type is where acts committed are legally permissible under coercion. Such acts, if committed through words or deeds, have no legal effect and are considered void. If these acts can be attributed to a third person, then, they are attributed to the person coercing or threatening another. For example, compensation for property destroyed through coercion shall be paid by the person who coerces the other. The second type are

acts that are legally prohibited, like murder, rape, etc. In such cases the person coerced shall be fully liable along with the person who coerced him.

2. The second opinion is held by the Hanafīs, who divide *ikrāh* into three types:
   a. First is coercion that negates free will or choice. This is coercion under threat of death or loss of limb.
   b. The second type is coercion that negates consent, but makes free will irregular or *fāsid*. This is brought about by confinement for a long period or by beating and torture that does not lead to loss of life or limb.
   c. The third type is *ikrāh* that does not negate consent nor does it make free will *fāsid*. The example is confinement of close relatives. Some Ḥanafī jurists do not accept this third category, and link it with one of the categories above, depending upon the nature of the threat to dear ones.

Effect of coercion on legal capacity. The Ḥanafīs maintain that the condition of *taklīf* is the existence of the right to choose and not its validity (*ṣiḥḥah*). Irregular or *fāsid* free will, they say, is sufficient for the existence of *taklīf*. In all the above cases of *ikrāh*, free will is not invalid (*bāṭil*) though it may be irregular. *Taklīf*, therefore, may accompany *ikrāh*.

To facilitate the understanding of the act, for which coercion is taking place, the Ḥanafīs divide it into three types:

1. *Transactions*. These are divided into two kinds, on the basis of the effect of *ikrāh*:
   a. First are transactions that do not accept rescission, and do not depend upon consent, for example, divorce, manumission, marriage, retraction of divorce, *ẓihār*, *īlā'*, *'afw* (forgiveness) in intentional murder, and oath (*yamīn*.) All these transactions are valid under coercion, because they amount to a termination (*isqāṭ*) or relinquishment of a right; and relinquishment cannot be reverted, because these transactions are not dependent on consent.
   b. Second are transactions that accept rescission or revocation and depend upon consent. These are like sale, mortgage, hire, and other commutative contracts. These contracts accept rescission and depend upon the existence of

free consent. The *ḥukm* of such contracts concluded under coercion is that they are irregular (*fāsid*.) They can be ratified by the coerced party, after coercion has ceased to exist, in which case they are declared as valid (*ṣaḥīḥ*).

2. *Admissions and confessions.* All admissions and confessions, in order to be valid, must be accompanied by free will.
3. *Acts in general.* Acts, for this purpose, are divided into two kinds by the Ḥanafī jurists.

   a. First is the case when the coerced is a mere instrument in the hands of another, like a person picking up another and throwing him upon another thereby causing death, or hurt, or causing damage to property. If A causes B to fire at a bush knowing that C is hiding behind it, thus, causing the death of C, then, A shall be guilty of murder, while B will be an instrument in his hand. Other cases can be imagined. In such cases the act is attributed not to the instrument, but to one who caused him to move.

   b. Second is the case when the coerced cannot become an instrument in the hands of another, for example, in the commission of *zinā* or eating of food. In such a case, the person coerced is fully aware of his actions. Here the person coerced is guilty of *zinā* or for compensating property consumed. In the case of drinking of *khamr*, however, *ḥadd* is waived on grounds of *shubhah*.

The study of all the four elements of the *ḥukm shar'ī* is now complete, and we may move to the examination of the union of primary and secondary rules where the interdependence and interaction of the four elements will be seen.

Chapter 7

The Union of Primary and Secondary Rules

In a previous chapter we have tried to understand the meaning of *fiqh* and of *uṣūl al-fiqh*.[1] We have analyzed and understood each of the four elements of the *ḥukm shar'ī*.[2] It was stated that the law comes into action when all these elements interact. How these elements come together and facilitate the operation of the law may be explained both in terms of Islamic law as well as in terms of positive law. For the explanation of the interaction in law we may recall mentioning the picture of a legal system presented by H.L.A. Hart. It would be instructive to examine some of Hart's ideas in a little more detail.

Hart maintains that a society that is run by primary obligation-creating rules alone is no more than a primitive society. Some additional conditions must be satisfied. These he explains by examining the defects of a primitive organization. The first defect is that when a doubt arises as to what the rules are, and there is no procedure for settling this by reference to an authoritative text or to an official, an uncertainty is created about the rules. This implies that certain rules are required that help remove this uncertainty. The second defect he calls the static nature of the laws, because there is no procedure for deliberately adapting these rules to changing circumstances. "The only mode of change in the rules known to such a society will be the slow process of growth, whereby courses of conduct once thought optional become first habitual or usual, and then obligatory, and the

[1] See chapter 3.

[2] See chapters 4, 5, and 6.

converse process of decay, when deviations once severely dealt with are first tolerated and then pass unnoticed."[3] This shows that some other rules are required that help eliminate the old rules and introduce new ones. The third defect of this simple form of social life is the inefficiency of the diffuse social pressure by which the rules are maintained. Disputes will always occur as to whether a rule has actually been violated. If there is no machinery to authoritatively ascertain this violation the system will become inefficient.[4]

Hart says that "[t]he remedy for all of these three main defects in this simplest form of social structure consists in supplementing the *primary* rules of obligation with *secondary* rules which are rules of a different kind. The introduction of the remedy for each defect might, in itself, be considered a step from the pre-legal into the legal world."[5] The remedy for the defect of uncertainty is the introduction of what Hart calls the "rule of recognition." This rule helps identify all valid law.[6] Islamic law has its own rule of recognition, and we will discuss it in the final part of the book at some length. The second defect, that is, the static nature of the law is removed by introducing "rules of change."[7] Does Islamic law have rules of change? If so, what part of the law is subject to change? As has been indicated earlier, and will be explained in detail in the following chapter, Islamic law has an inner core that is not subject to change. This part of the law has been derived directly from the texts and, therefore, cannot be changed by any other primary or secondary rule. This immutable part, however, constitutes only five per cent or less of the entire legal system. The other part is flexible and revolves around this fixed part seeking its direction, bearings, and principles from the inner core. This flexible part changes with each change in circumstances. Islamic law provides a detailed methodology for effecting this change. The third defect requires for its removal a machinery for identifying violations. This, of course, is provided by Islamic law. The operation of secondary rules of this type will be coming up on the proper occasions. For the present we are concerned with certain other kinds of secondary rules that Hart has described. These rules, to use Hart's terminology, are

[3] Hart, *Concept of Law*, 90.

[4] Ibid. 89-91.

[5] Ibid. 91.

[6] Ibid. 92

[7] Ibid. 93

"parasitic upon or secondary to"[8] the obligation-creating rules. In other words, they facilitate the operation of the obligation-creating rules.

7.1. The union of rules

The operation of the primary and secondary rules in interaction with each other in Islamic law is essentially the same as that in the law. The complexity within the Islamic system, however, increases due to a large number of categories about which the law is indifferent. The first category is that of rights. In Islamic law, the primary thing that needs to be determined is what kind of right is invoked by a law. Is it a right of Allāh? Is it the right of the individual? Is it a combination of both? Is it a right of state? This in turn depends on the classification of the law that has been described earlier. If the law relates to worship or to the *ḥudūd*, for example, the right invoked is the right of Allah. If the act being judged or the rule violated belongs to the area of obligations, it is usually the right of the individual that is invoked. If the rule violated is that of retaliation (*qiṣāṣ*), then two kinds of rights are invoked: the right of Allāh and the right of the individual, with the right of the individual being predominant.

The rule being verified and the right determined, the next step is to determine whether the cause has been brought about. This is achieved through the due process of law, that is, by following a determined procedure in court and by adducing proper and admissible evidence. Once this has been proved the condition, being a secondary rule, is verified. After this, the official finally turns to the capacity of the individual to see if general defenses or obstacles are to be found in the path of operation of the *ḥukm*. Let us examine this in a little more detail.

For a *ḥukm* to become operative and the consequential obligation to arise, the cause of the *ḥukm* has to be brought about. The cause is brought about sometimes by the Lawgiver Himself, sometimes by the subject, and sometimes through indirect causes. Thus, the cause for the evening prayer—the setting of the sun—is brought about by the Lawgiver, while the cause for the obligation of the *ḥadd* penalty is brought about by the subject, like theft for the cutting of the hand.

Depending upon the *ḥukm* that is set in motion a related right is invoked. This right entails certain consequences or may in turn

[8] Ibid. 79.

invoke certain conditions or exemptions. For example, in the case of murder a combination of rights is invoked: the right of Allāh as well as the right of the individual. The effect of invoking the right of Allāh is that a certain kind of doubt (*shubhah*) acknowledged by Islamic law may come into operation and would result in the withholding or waiving of the punishment. This type of *shubhah* operates only with the right of Allāh. As soon as the *ḥadd* penalty is waived in this case, and the right of Allāh is released, the right of individuals collectively, that is, the right of the state may come into operation. In such a case, the existing *shubhah*, which was effective in the case of the right of Allāh, is of no consequence, and *ta'zīr* may be awarded.

The general sequence of operations is to first check the cause. By checking the cause we mean, for example, that a person accused of the offense of theft is to be tried in a court of law to prove that he actually was guilty of bringing about the cause. For example, repentance and returning of the property by the offender before he is apprehended. Once this is proved the right involved is checked. Any benefits that can go to the accused because of this right are to be granted, and this may change the nature of the charge or indictment. When the cause is being established, the associated conditions are also to be established. Thus, in the case of theft, the court must establish that all the conditions pertaining to *ḥirz* (breaking into a place of safe-custody) and *niṣāb* (stealing of a certain minimum value) have also been established. In addition to this, all the conditions specific to evidence and procedure must also be met. After all this has been done, if an impediment (*māni'*) exists, as when the offender is a minor or insane, the *ḥukm* will still not come into effect, and no penalty will be awarded. If the penalty is awarded it becomes a cause for another obligation, the obligation placed upon the *imām* to arrange the execution of the sentence.

In this case, the primary rule is the prohibition of theft with its associated penalty. The rest is all being settled by the secondary rules that facilitate, if one may say so, the operation of the primary rule. It is through this union of the primary and secondary rules that the law operates and is set in motion. The elements of the *ḥukm shar'ī* all come into play. It is the Lawgiver Who determines what a cause is for a *ḥukm* to come into action and what is its consequential penalty or remedy. It is the Lawgiver Who places the obligation on the rulers to carry out the operation of the law, and it is He Who determines what right is affected. Once this is done, it is the *ḥukm* that comes into motion through its associated right. The final effect of all this

is that the subject who brought about the cause is paced under a liability or is assigned a penalty if he has the required legal capacity.

The same can be said about any kind of *ḥukm*. Take for instance the imposition of *zakāh*. The cause is the existence of wealth. The condition is the passage of a year (*ḥawl*). The act is related to the right of Allāh. The obstacle (*māni'*) may be the existence of debts. If all the conditions are met, and there is no obstacle, this right of Allāh must be satisfied, and payment of *zakāh* becomes obligatory upon the subject (*mukallaf*).

To understand the operation of Islamic law and its structure, it is essential to keep this sequence of events in mind. The key is to understand that the obligation-creating rules are being helped by the secondary rules listed under the category of the determining *ḥukm*. These primary and secondary rules are distributed among the four elements of the *ḥukm shar'ī* that we have discussed in the previous chapters.

We may now turn to the final chapter of this part. This relates to the fixed and flexible spheres of law. As the explanation of these spheres is an addition over the traditional method of describing *uṣūl al-fiqh*, nothing much will be lost if the reader decides to skip it and move to the next part.

Chapter 8

Doctrines of *Ḥadd* and the Spheres of Law

Our understanding of the Islamic legal system and the nature of its law will not be complete if we do not explain what we mean by the fixed and flexible parts of the law or law the discovery of which falls within the domain of the jurist and law the development of which is within the jurisdiction of the *imām*, that is, the state. This will be the burden of this chapter. Another basis for this chapter are some observations made in different quarters about the Islamic legal system. An attempt will be made here to clarify the misconceptions on which these observations are based. The first observation is a favorite theme with Western scholars, like Schacht, while the second is in the shape of a fundamental question raised by the Federal Shariat Court of Pakistan.

Western scholars who have written about Islamic law consider the *sharī'ah* to be fixed and immutable. This, they say, led to the rigidity of its law, and the rulers had to resort to secular laws that had nothing to do with the *sharī'ah*. The result was a split in the Islamic legal system, and the *fuqahā'* and their works became increasingly isolated from the actual administration of justice. To support this assertion, they also state that the *fuqahā'* themselves began resorting to *ḥiyal*, which the Orientalists erroneously designate as legal fictions,[1] in order to overcome the rigidity that had crept into law. The question that emerges from this observation of Western scholars is whether the *sharī'ah* is fixed and immutable, hence rigid, and whether this rigidity confines the *sharī'ah* to a limited role in matters of state?

[1] See Appendix I.

The second observation is not directly related to the first, yet the answer for both is to be found in the same place. The Federal Shariat Court of Pakistan, while hearing a petition on the question of *rajm* (stoning to death for unlawful sexual intercourse by a married person), indirectly questioned the doctrine of *ḥadd* in Islamic criminal law. The Court pointed out that the term *ḥadd* had been used on fourteen (thirteen?) different occasions in the Qur'ān, in the sense of restrictions or bounds set by Allāh. None of these uses gives the meaning of *ḥadd* as a fixed penalty, which is generally the meaning assigned to the term *ḥadd* by the jurists. The Court added that it also appears from the traditions of the Prophet and the sayings of the Companions that the word *ḥadd* was used in the sense of punishment alone and not "fixed punishment." The traditions, thus, do not establish the meaning assigned to it by the *fuqahā'*. In addition to this, the jurists also differ about the number of punishments to be treated as *ḥadd*. These range from four to seventeen. On the basis of the definition of *ḥadd* given by the *fuqahā'*, all punishments awarded by the Prophet should have been treated as *ḥadd*, but the Court found it to be very strange that only a few were classified as such. The punishment of drinking of wine (*shurb al-khamr*) was not found in the Qur'ān, and was not uniform in the *Sunnah* yet, it has been treated as *ḥadd*. There is also no distinction between *ḥadd* and *ta'zīr* in the *Sunnah*. Concluding these observations, former Chief Justice of the Federal Shariat Court, Justice Aftab Hussain said: "My finding is that the word *ḥadd* has been defined by the jurists a long time after the death of the Holy Prophet."[2]

This, indeed, is an important question raised by the Court. If the concept of *ḥadd* is changed, and all punishments are classified as *ta'zīr*, or all are classified as *ḥadd*, the entire structure of criminal law as erected by the *fuqahā'* is bound to collapse and would have to be built on a different foundation. There is no difficulty in agreeing on the point that the division into *ḥadd* and *ta'zīr* is a later development, but the question as to why the *fuqahā'* treated some penalties as *ḥadd*, and not others, needs to be explained. To do so we may reframe the question. Is the classification of crimes into those of *ḥadd*, *ta'zīr*, and *siyāsah* really necessary? If so, how is this classification justified?

We shall begin by stating the solution, which is actually a description of a unique feature of Islamic law. This will be followed by a statement of the reason why Western scholars have not been able

[2] *Hasoor Bakhsh vs. The State*, PLD 1983 FSC 1.

to understand the structure of Islamic law and have come up with their theory about the rigidity of the *sharī'ah* and the "separation between theory and practice." A general theory shall be built up. Once this has been explained, the theory shall be applied to the law of crimes to explain the second issue about the classification into *ḥadd* and *ta'zīr*. Some of these explanations assume that the reader has a basic knowledge of Islamic law, particularly of Islamic criminal law. Efforts will be made, however, to simplify the problem so that all readers can benefit from it.

8.1. The spheres of Islamic law

The word evolution when used with Islamic law is likely to evoke different reactions. Those who feel that the *sharī'ah* was laid down once and for all may reject the idea of evolution in Islamic law. Their objections are partly justified. But, as Islamic law is meant to apply to every aspect of a Muslim's life in all ages, it follows that it has to evolve and grow like any other legal system so that it may be able to cater to the demands of the changing times. This is exactly what it does and is designed to do. The *sharī'ah* may be fixed and immutable at its central core, as is claimed by some,[3] but is not so in its extensions. The truth is that Islamic law grew gradually to become a complete legal system. The nature of its growth resembles that of a seed embedded in fertile soil. The seed contained within it the genetic code of the entire legal system. It grew into a living organism that would constantly adapt itself to the changes in its environment. The laws in the Qur'ān and the *Sunnah* of the Prophet, it is true, have been determined and fixed for all times to come. These comprise the core legal concepts, the genetic code, so to say. As Muḥammad was the last of the prophets, there is no chance of mutation in these laws. Calls for *ijtihād* in the present age, if they are meant to alter such fixed laws, are futile and unnecessary. These fixed laws, however, cover a relatively small area of the activity of a modern state, and the bulk of the laws remain to be discovered. The system continues to grow.

The manner in which the growth of the Islamic legal system takes place has been indicated by the *fuqahā'* themselves. An analysis of their works reveals that they conceived of the Islamic legal system as

[3]See Noel J. Coulson, "The State and the Individual in Islamic Law," *The International and the Comparative Law Quarterly*, 6 (1957): 49–60.

operating through two linked spheres. The first part of this system is relatively fixed, while the second is "flexible," changing with the times, growing with the needs of the Muslim community. The *fuqahā'* expounded and elaborated the law laid down in the fixed part and left the development of the flexible and ever-changing part to the ruler, who was to develop and apply it in accordance with his own times. It is for this reason that the fundamental qualification stipulated for the ruler was that he be a *mujtahid*, a fully qualified and independent jurist capable of interpreting and applying the principles of the *sharī'ah* to all new situations. The seed grew into a young plant and the plant into a tree with many branches bearing different kinds of fruit. Care for roots of the tree and its trunk were the responsibility of the *fuqahā'*, while the tending of the branches and the leaves, that change shape in every season and age, was left to the ruler. This has already been explained in the initial chapters.

The ruler carried out this function through a policy called the *siyāsah shar'iyah*. This may be translated as the "administration of justice according to the *sharī'ah*." When such administration conformed with the dictates of the *sharī'ah*, it was called *siyāsah 'ādilah* or administration according to justice. If his policy or administration deviated from the norms of *sharī'ah*, it was called *siyāsah zālimah* or tyrannical administration.[4]

The evolutionary aspect of Islamic law has usually escaped the attention of scholars, especially the Western scholars. The attention of the Western scholars has generally been directed toward the origins of Islamic law, where the effort has often been to show how much Islamic law has borrowed from Jewish or Roman law. To achieve this, their energies have been devoted to the construction of the history of the sources of Islamic law, the aim being to indicate the lack of originality, in other words the falsity, of Islamic law in particular and of the whole religion of Islam in general. One scholar puts it this way:

> The idea that these are religions "in history" has led to an emphasis on the desire to discover "what really happened," ultimately, because of the underlying belief that this discovery would demonstrate the ultimate truth or falsity of the individual religion.[5]

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[4] Ṭarābulusī, *Mu'īn al-Ḥukkām* 1 (s.l, n.d.).

[5] Rippin Andrew, "Literary Analysis of *Qur'ān*, *Tafsīr*, and *Sīrā*," *Approaches to Islam in Religious Studies*, R. Martin, ed. (Tucson, 1985).

In short, they have not studied the legal system of Islam as a legal system should be studied. They have never felt the need to consider Islamic law as an evolving and growing legal system. The effort to show the separation between theory and practice has been in the forefront, whenever later periods of its history have been surveyed. This is particularly true in the case of those periods when sincere efforts have been made by the Muslims to bring the "flexible" part of the law in conformity with the principles derived from the fixed part, as in the case of the Ottoman Turks prior to the *tanẓīmāt* reforms, or of the period of Awrangzeb 'Ālamgīr in India. Some acknowledge that the laws of Sulaymān 'Ālīshān in Turkey (sixteenth century), which were promulgated under the supervision of the *Shaykh al-Islām*, were the "swiftest laws in Europe"; yet they continue to insist that these laws were not based on the *sharī'ah*. The legal system established by Awrangzeb 'Ālamgīr continued to flourish for a long time and was used by the British too for a considerable period. The major contribution of Western writers in this area has been that they have made Muslim scholars conscious of the field of Islamic legal history.

Is it, however, the duty of Western scholars to devote their energies and resources to the study of the Islamic legal system? Not necessarily. That is primarily the duty of Muslim scholars, who have generally been busy reproducing the works of the *fuqahā'*, in varying arrangements. Their first duty, in the opinion of this writer, is not to show the supremacy of their legal system over other systems, but to discover the exact nature of their legal system. The present-day Muslim scholars have failed to study the evolutionary growth of their own legal system. The general trend has been to condemn *taqlīd* and complain about the closing of the gate of *ijtihād*. Islamic law has never stopped growing, and the allegations of *taqlīd* and the closing of the gate of *ijtihād*, against the jurists, are founded on a superficial understanding of the nature of this law. It was the Muslims themselves, who fell victim to mental paralysis during the age of colonization and subjugation not their jurists. In this period too the law has continued to grow either through practice or by consolidating itself in theory.

Now that Muslims have regained their independence, and have, after after a period of flirtation with the West, begun a search for their identity, it is to be hoped that things will improve. It should be kept in mind that Islamic law is not only a stable tree patiently waiting for its fruit to be picked, it may also be compared to a giant river that has moved very rapidly in some stages, while in oth-

ers it has slowed down, spreading out into the plains, consolidating, depositing its fertile silt, and then moving on—sometimes bursting out again through the dams that have been constructed to block its path, threatening to wash away all that stands in its way. It is possible that the dams blocking the path of Islamic law today may burst again, with unpredictable consequences. The consequences will be unpredictable as Muslims are not prepared; they lack the theoretical conviction and the know-how to handle their own law. This is not to say that they lack the skills or are less intelligent than their predecessors; what is lacking is the right attitude and the determination to understand the nature of this law.

8.2. A legal basis for the spheres

What is the legal basis for this conceptual separation of the two spheres? How can one be distinguished from the other? To understand this we have to appreciate two things: the doctrine of *ḥadd* and the classification of laws on the basis of rights.

The doctrine of *ḥadd* is normally associated with the law of crimes, where it is taken to mean "fixed penalties determined to be the right of Allāh." This is the narrower concept of *ḥudūd*. Here we are concerned with the larger doctrine of *ḥadd*, the details of which have been provided by al-Māwardī and others, though very briefly. It has been indicated above that the term *ḥadd* occurs thirteen times in the Qur'ān and none of these terms implies the fixed penalties. The list is long and it will be easy to say at this stage that all the *'ibādāt*, the fixed penalties classified as *ḥadd*, and most of the laws that are prescribed in the Qur'ān, as well as many of those in the *Sunnah* are included in the inner sphere.[6] This is the larger doctrine of *ḥadd* and should not be confused with the narrower concept of fixed penalties, which is included in it. To simplify the matter, we may say that all those issues of the law that are explicitly stated in the texts (the Qur'ān and the *Sunnah*) or are very closely related to them fall within the ambit of the wider meaning of *ḥadd*. This wider meaning is indicated in the Qur'ān in several places. Consider the case where the form of divorce is laid down and it is suggested that property given to women should not be taken back upon divorce. The verse ends with the warning: .

[6]The inner sphere or the fixed sphere, as mentioned in Chapter 2, is one around which the flexible sphere revolves, and from which it draws its inspiration.

تِلْكَ حُدُودُ اللَّهِ فَلَا تَعْتَدُوهَا وَ مَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَأُولَٰئِكَ هُمُ الظَّالِمُونَ

These are the limits (imposed by) Allāh. Transgress them not. For whoso transgresseth Allāh's limits: such are the wrongdoers.[7]

The *fuqahā'* devoted their energies to the identification of all the *ḥudūd* prescribed by law, and their manuals of law deal with the larger doctrine of *ḥadd*. Those who may have some reservations about this should closely examine the work of at least one great Muslim jurist, Ibn Rushd. In his book *Bidāyat al-Mujtahid* he discusses most of the issues of *fiqh*, but mentions again and again that he is only dealing with the part of the law that is explicitly laid down in the texts or is closely related to it.

The doctrine of *ḥadd* works hand in hand with the concept of the right of Allāh. We have already discussed the division of the laws into primary and secondary rules. We may recall one important classification here, which is perhaps the most important of all. This is the classification of the primary laws, that is, the *ḥukm taklīfī* into those laws that relate to the right of Allāh and those that relate to the right of the subject. There are two intermediary overlapping categories as well, but we may ignore them for the time being. We have also said that it is customary with modern writers to equate the right of Allāh with the right of the state or the right of the community. This is a false notion. The right of Allāh is independent of the right of the state or that of the community. The right of the state is, in fact, the right of the individuals as a whole, that is, the collective right of the community. This has been referred to as *ḥaqq al-salṭanah* by al-Māwardī and *ḥaqq al-sulṭān* by Ibn Rushd. The right of Allāh (*ḥaqq Allāh*) is owed by the Muslim community to Allāh, and is not owed by the individuals to the community or to the state. This is the crucial point. The right of Allāh is fixed by Allāh, once and for all and is not subject to legal or judicial review, that is, it is outside the purview of the law. It can never be altered. Failure to understand these distinctions is likely to lead to a misreading of Islamic law.

All laws that are related to the right of Allāh are part of the fixed sphere of the law. These can never change and are fixed till eternity. All laws that are not related to the right of Allāh, that is,

[7] Qur'ān 2 : 229

those that are the right of the individual or the right of the *salṭanah* and have not been expressly stated in the texts are liable to change. In fact, they should change in each age to adapt to new conditions. This statement needs to be qualified though: Any laws that involve the right of the individual, but have been specifically fixed in the Qur'ān or the *Sunnah* belong to the fixed sphere and are to be considered as rights granted by Allāh and as boundaries fixed by Him, for example, the laws of inheritance that have been explicitly laid down in the Qur'ān. Such rights are to be considered together with other basic and inalienable rights that have been explicitly granted by Allāh to individuals. They may not be changed or even suspended temporarily, whatever the emergency. They are outside the pale of legal review.

8.3. Interaction of the spheres

The two spheres of the law, which we may for the sake of convenience call the "fixed" and the "flexible" spheres, are linked to each other through an organic relationship. They are not mutually dependent. In fact, it is the flexible sphere that is dependent on the fixed and unchangeable sphere, and may be said to revolve around it, changing its complexion in each age. The relationship is best described through our example of a tree. The fixed part is firmly planted in the ground,[8] while the changing part is like the branches that spread out and keep on changing their shape and appearance in different times and seasons. It is these branches that require some pruning in different periods so that their growth and the fruit that they yield are abundant. The terms *uṣūl* or roots and *furū'* or branches fit in with this image. An explanation required in this picture is that some of the branches or *furū'*, developed by the *fuqahā'*, that is, those branches very close to the trunk of the tree, are also relatively fixed. These, basically, are laws extended through strict analogy (*qiyās*), as distinguished from some wider forms of analogy that we shall take up in the next part.

The fixed part of Islamic law performs a number of functions. Some of these may be indicated here.

- The first function is to provide the basic law on which the foundations of Muslim society are laid. These laws do not explicitly

[8] Assuming that the roots are not growing all the time, which in organic life they do.

cover the entire range of human activity, but deal with that core from which the rest of the law is developed. The laws of this part are governed by the doctrine of *ḥudūd*. By *ḥudūd*, as indicated earlier, we do not mean the fixed punishments provided in the Qur'ān and the *Sunnah*, but the wider concept. The *ḥudūd* exist, in this wider meaning, as a basic minimum right of Allāh over the Muslim community.

- The literal meaning of the term *ḥudūd* is limit or boundary. This meaning describes, exactly, the second function of the fixed part of the Islamic law. It lays down the limits or outer boundaries within which the flexible part is to be developed or evolved. These boundaries are never to be crossed. In other words, it means that prayers will always be a prescribed duty, unlawful intercourse will always be prohibited, *ribā* (usury) will never be made lawful, inheritance laws will always assume the same ratios, and so on. All laws laid down as boundaries shall forever remain unaltered and fixed. The flexible or changing law will have to grow and develop within these boundaries, but will never be able to affect or alter the nature of the fixed law.

- Another function of the fixed part is that it furnishes the principles of Islamic law. The flexible part of the law is developed on the basis of these principles. These principles should not be confused with the opinions of the jurists as found in the books of *fiqh*. The opinions of the jurists should be taken as decisions arrived at in particular cases and not the principles relied upon for arriving at those decisions. The principles furnished by the fixed part of the law should also not be confused with the rules of interpretation laid down by the science of *uṣūl al-fiqh*, which are principles utilized for the derivation of the fixed law. Finally, the principles emerging from the fixed law should not be confused with the rules or particular provisions of the substantive or procedural law. Such provisions are rules to be followed for a defined set of facts, while the principles are more general in nature.[9] The sources for the principles of Islamic law are the Qur'ān and the *Sunnah*. These principles may be explicitly stated in the sources or may be derived from them and then

[9] We shall explain the meaning of the term "principle" intended here in the next part in chapter 10, within the discussion of theories based upon general principles.

unanimously accepted through consensus (*ijmā'*), which is a judicial function.

- An important function of the fixed part of the law is to yield the ultimate principles or the purposes of the Islamic law. These are what have been called the *maqāṣid al-sharī'ah*. They are "interests" preserved and protected by the *sharī'ah*. The law is developed through a reconciliation of these competing interests. The *maqāṣid al-sharī'ah* not only include the major interests secured by the *sharī'ah*, but also assimilate, within them, all the general principles of the law described above. The theory of "interests" is discussed in great detail in the works of Muslim jurists like al-Ghazālī and al-Shāṭibī, and will be taken up in the second part of this book.

- Beyond the purposes, principles, and rules provided by the fixed part of the law are the collective teachings of the Qur'ān and the *Sunnah* that provide the moral norms not expressly acknowledged by the sources, but are derivable from the general character of the social morality that surrounds the law. Such moral norms may be used, according to al-Ghazālī, to develop the law, though he considers them to lie within the category of the *taḥsināt*.[10]

Now that the domains of the Islamic law have been described, let us turn to answer the question raised by the Federal Shariat Court, and find yet another reason for understanding the structure of Islamic law through the two interacting spheres.

8.4. The spheres of law and *ḥudūd* penalties

We have already indicated that the classification of laws into those invoking the right of Allāh and those related to the right of the individual is not an idle classification. The Muslim jurists were not fond of classification for the sake of classification, as some critics assume. This classification makes a great difference in practice. Indeed, it is the most important classification in the Islamic legal system. It has tremendous explanatory power as far as the structure of the legal system is concerned. Many important consequences flow from it. We

[10]The meaning is provided in the discussion of al-Ghazālī's theory in Chapter 12.

shall only mention a few of these with reference to the Islamic law of crimes. The consequences of this classification for Islamic Criminal Law are the following:

1. The penalty for an offense against the right of Allāh cannot be waived or commuted after apprehension and conviction. However, the penalty for an offense against the right of an individual alone or against the rights of individuals, that is, the right of the state, can be commuted. The important point to be made here is that if the right of Allāh and the right of the state (or the right of the community as a whole) were the same thing, the state would not be able to commute any sentence according to the system developed by the jurists, whether awarded as *ḥadd*, *ta'zīr*, or as *siyāsah*. We know very well that the state can pardon any sentence that is not a *ḥaad*. The reason is that sentences other than *ḥadd* are not awarded and applied as a right of Allāh.

2. *Shubhah* (doubt) in the right of Allāh has the effect of waiving the penalty of *ḥadd*, while it does not have the same effect in *ta'zīr*. *Qiṣāṣ* (retaliation) has been assigned an element of the right of Allāh as it is waived due to *shubhah*. This kind of doubt is not to be confused with the benefit of a doubt that goes to the accused in positive law, which is a doubt in the mind of the judge as to whether the crime has been proved beyond doubt. Islamic law has no objections to this, as proving an offense beyond doubt is a requirement in Islamic law. *Shubhah* mentioned here exists in the mind of the accused at the time of the commission of the act on the basis of conflicting opinions about the *ḥukm* or because of a particular set of facts. An example of *shubhat al-milk* is, in the opinion of Mālik, when the offender steals (or takes by way of stealth) the property of the *bayt al-māl* (treasury) under the impression that he is part owner of the property.

3. All *ta'zīr* is the right of the individual and it is for this reason that *shubhah* does not operate in it. This is the claim made by al-Kāsānī. Some jurists, mostly Shāfi'ites,[11] have said that

[11] Al-Māwardī is one of the first to have said this. See *al-Aḥkām al-Sulṭāniyah*, 237. There are some later Ḥanafī jurists too who have maintained that *ta'zīr* may be a right of Allāh or the right of the individual. One such Hanafī jurist is Ibn

ta'zīr can also be a right of Allāh. This is an inconsistent statement, for *ta'zīr* as a right of Allāh would prevent pardon (*'afw*), which is an acknowledged attribute of *ta'zīr*.

4. The evidence of women is not admissible in the right of Allāh, that is, in *ḥudūd*, while it is in the case of *ta'zīr*, which is the right of the individual, but the *niṣāb* of one man and two women has to be maintained, as in the case of other rights of the individual. No such restriction is applicable to the right of the state and a single woman can furnish evidence that is admissible in cases falling under *siyāsah*, just as circumstantial evidence is admissible whenever the *ḥaqq al-salṭanah* is in issue.

There are other manifestations of this distinction, but these will suffice for the present purposes.

The question that arises at this stage is, why did the *fuqahā'* choose to divide punishments into *ḥadd*, *ta'zīr*, and *siyāsah*? Is it only because the *ḥadd* punishments are fixed in the Qur'ān and *Sunnah*? According to modern Muslim writers this appears to be the only reason, because of which they consider punishments to be divided into two categories only: *ḥadd* and *ta'zīr*. There are, however, some problems with this, mostly of analytical consistency. The issue, as indicated earlier, was discussed in a case appearing before the Federal Shariat Court of Pakistan. The major question is: Why did the *fuqahā'* choose only a few penalties out of the several awarded by the Prophet and classified them as *ḥadd*, leaving other penalties out? The answer to this question is complex, but not beyond comprehension. It may be broken up into the following points:

1. The first point is that the majority of the jurists considered those penalties as *ḥadd* that are mentioned in the Qur'ān. The penalty for drinking wine is not mentioned in the Qur'ān, but the act of drinking wine has been condemned as an offense. The penalty is found in the *Sunnah*, where it is different in different traditions, but the jurists selected a penalty according to their different methods of preferring traditions. If a difference of opinion has arisen over the extent of the penalty, it is not very important. The significant point is that the penalty has

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'Ābidīn. He does, however, realize the inconsistency and is forced to say that when *ta'zīr* is a right of Allāh, it cannot be commuted, that is, it will not accept *'afw* (pardon). See *Ḥāshiyat Ibn 'Ābidīn*, iii, 192.

been provided by the *Sunnah*, which is an authoritative source of law.

2. The second point, and this is most important, is that all the penalties declared as *ḥadd* are governed by a certain procedure and a particular form of evidence. The Qur'ān specified four trustworthy witnesses for the offense of unlawful sexual intercourse and the *Sunnah* prescribes two for other offenses. In addition, the *Sunnah* lays down different conditions for some of these offenses, which must be met before punishments can be meted out. These are, for example, the conditions of *ḥirz* and *niṣāb* for the offense of *sariqah* (theft). The *ḥikmah* (wisdom) in these punishments appears to be that the primary purpose is deterrence, even if they are applied rarely due to stringent conditions of proof. If all other punishments were also to be governed by the same rules, that is, if every punishment were to be classified as *ḥadd* and had to be proved through such high standards of evidence and proof, social control, which is the major purpose of the law, would be difficult. In addition, the evidence of women would have to be excluded from the entire criminal law. As each crime would relate to the right of Allāh, forgiveness (*'afw*) and commuting of sentences, as described earlier, would also not be possible.

3. If, on the other hand, all the *ḥudūd* penalties were called *ta'zīr*, the first effect would be that the evidence of women would be included with two women replacing one man. The second difference would be that forgiveness of the sentences now called *ḥudūd* would be possible. The third effect would be that the penalties would be at the discretion of the judge or ruler, to be varied and changed as he deemed fit. Further, these penalties would be declared as the right of the individual as in the case of *ta'zīr* and would no longer be associated with the concept of limits or bounds of Allāh. All this would be against the teachings of the Qur'ān and the *Sunnah* of the Prophet, besides creating many logical inconsistencies.

The *fuqahā'*, then, with their superior knowledge of the Qur'ān and the *Sunnah* realized that the the sources of *sharī'ah* required some penalties to be maintained as the *ḥudūd* of Allāh, limits or boundaries never to be crossed whatever the age or civilization and whatever the conditions of life. These were the rights of Allāh. They

separated these from wrongs associated with the rights of the individual. This area was called *ta'zīr*.

This should suffice to answer the question raised by the Federal Shariat Court. Another problem arises, however, with respect to *ta'zīr*. We have been maintaining that there are two spheres of law, one fixed and the other flexible, but the law of crimes appears to present three: *ḥadd*, *ta'zīr*, and *siyāsah*. This apparent difference needs to be resolved.

The *fuqahā'* rarely discuss *ta'zīr* in detail, with the result that it is extremely difficult to determine the exact scope of *ta'zīr*. Some research has been done on this by scholars, but there is need to be more analytical and to avoid logical inconsistencies. This is a problem to be discussed under the law of crimes, yet some explanation appears to be necessary even at this stage.

We have indicated that the third area is that of *siyāsah*, which is the "flexible" and changing part of the law depending on the *ijtihād* of the ruler. We have also said that *ta'zīr* relates to the right of the individual where the standards for evidence require two male witnesses or one male witness and two females. *Siyāsah*, on the other hand, relates to the right of the state (*salṭanah*) or to the rights of the individuals collectively where the standards of evidence are more relaxed insofar as it depends on the ruler to determine them in accordance with the requirements of his times. Now some modern scholars conclude that *ta'zīr* can be a right of Allāh and a right of the individual, and by right of Allāh they mean the right of the state, because they equate the two. They base their opinion on the views of some *fuqahā'*.[12] It is, however, felt that *ta'zīr* should be designated as the right of the individual. This is the practice of the Ḥanafites and appears to be based on analytical consistency. An example will illustrate why.

If a man steals from the *bayt al-māl* there is no *ḥadd* penalty for him. The reason is based on *shubhat al-milk*. The *bayt al-māl* is the common property of the Muslims and for purposes of *ḥadd* the offender is considered to have committed a theft from his own property that is jointly owned with the Muslims. *Ḥadd* is waived due to the doubt, actual or legal, in the mind of the offender arising from joint ownership of the property. This person, however, is not allowed to go scot free. He is awarded punishment under the rights of the state or the rights of the individuals collectively, as *shubhat*

[12]See, e.g, al-Māwardī, *al-Aḥkām al-Sulṭāniyah*, 237.

al-milk is not operative against these rights, but it is effective in the waiver of punishment in the right of Allāh. If *ta'zīr* is declared as a right of Allāh, this particular offender will go scot free on the basis of the same *shubhah*, as the right of Allāh is to be waived in such a case, which would defeat the purposes of the law and those of social control. To state it differently, if both *ḥadd* and *ta'zīr* are considered the right of Allāh, the doubt or *shubhah* related to ownership would operate in both.

There is another difficulty involved with the concept of *ta'zīr*. In the case of murder or *qatl 'amd* the penalty is *qiṣāṣ*, but only when the offense is proved through the testimony of two male *'adl* witnesses. If the offense is not proved in a certain case, but there is sufficient circumstantial evidence to convict the offender, will the state try this person under *ta'zīr* or under *siyāsah*? Under *ta'zīr*, the system of the *fuqahā'* requires two witnesses again, with one male being replaced with two females, that is, almost the same kind of testimony. In *siyāsah* the standards of testimony are lowered and the case can be proved more easily.

The only solution appears to be to merge the two areas of *ta'zīr* and *siyāsah* with the standards of proof and modes of procedure being determined by the *imām*. This the Muslims appear to have done already, without taking into account the *niṣāb* for testimony.[13] The point that needs to be emphasized here is that this area, whatever the name chosen, cannot be designated as a right of Allāh, as this would invoke *shubhah* and its consequences. In this case the right belongs to the state or to the Muslim community. This will avoid logical inconsistencies and help build upon the system erected by the *fuqahā'*.

All this leads us to the conclusion that there are two spheres of Islamic law (and should be two in the law of crimes also), one fixed, existing as the right of Allāh, while the other is flexible and changing. The concept of *ḥudūd* includes all those things that al-Māwardī lists, ranging from *'ibādāt* to penalties, inheritance to *zakāt*, and so on. It includes some of the institutions that relate to the rights of individuals and have been determined in the Qur'ān and have also been designated as *ḥudūd*. The reason is that these relate to rights explicitly granted by Allāh. Thus marriage will always be a required

[13]Thus, for example, the *Ḥudūd* Ordinances applied in Pakistan do not require the testimony of two male witnesses. An offense classified as *ta'zīr* can be proved through the testimony of one witness, even when the witness is a female.

institution, which cannot be replaced by common law marriages and child-care. Inheritance will always be distributed according to the Qur'ānic injunctions, and *ribā* will always remain prohibited. There is very little or no scope of further *ijtihād* in this area. The jurists devoted fourteen centuries to the development of the fixed part of the law and have developed it to its limits. They have always left the flexible or changing area that relates to the rights of the individuals as a community for the *imām* to develop and which is waiting today to be developed in accordance with the purposes of Islamic law and its general principles.

8.5. Advantages of visualizing two spheres

It is possible that some readers may find it difficult to accept the idea of two spheres of law interacting with each other, because this has not been explicitly stated anywhere in the books of the jurists. The reply to this objection, if raised, is that this is not a physical division of the law into two parts; it is proposed as a conceptual tool, a tool for analyzing the complex structure of Islamic law. Visualizing the law as operating in two interlinked spheres presents a number of advantages. Some of these may be the following:

1. It helps us understand why the jurists confined their juristic activity to certain areas and did not extend it to others. For example, we know that certain legal institutions existed from very early times. These, among others, were the *maẓālim* courts and the institution of *ḥisbah*. The Muslim jurists almost never mention these institutions in their law books, not even to declare them as legal or illegal according to the *sharī'ah*. It was al-Māwardī, followed by Ibn Khaldūn, who mentioned these institutions in some detail in his book *al-Aḥkām al-Sulṭāniyah*. It was only after this that later jurists like Ibn Taymīyah and Ibn al-Qayyim discussed them. The purpose of these jurists was to elaborate upon the interaction of the two spheres. In addition to this, the *fuqahā'* scarcely mention *ta'zīr*. When they do so it is done very briefly. The conclusion from all this is obvious: the *fuqahā'* developed the area of the law that was within their domain to its limits and left the remaining for the *ijtihād* of the ruler (*imām*).

2. It follows from the above that the jurists never really closed the door of *ijtihād*. The area left for the ruler to develop was always

wide open and it still is. The rulers did develop some institutions, but they apparently never established them on sound footings, or at least in a manner that these institutions and laws could grow with each succeeding generation without depending upon individuals. It also appears that the personality of the ruler has always been deemed more important than sound institutions. This has its remnants in Muslim states even today. It is, therefore, possible that as governments changed the institutions collapsed with them. A sincere effort appears to have been made during the Ottoman times around the sixteenth century. That, however, was cut short by the *Tanẓīmāt* reforms. In other regions like India, the efforts of rulers like Awrangzeb 'Ālamgīr were swept away by Western colonization. Are we, then, on firm ground when we blame the jurists for *taqlīd* and stagnation when they are not at fault and were not responsible for establishing those institutions and laws that we need today?

3. The idea of two spheres sets aside the frivolous doctrine of separation between theory and practice. After all what criteria do the Western writers use for claiming that the laws made by the rulers in different ages were un-Islamic or did not conform with the general principles of the *sharī'ah* as applied in different ages.

4. The conceptual division into two spheres helps us realize that it is not proper to choose opinions from the fixed part and try to plant them in the area that is not fixed. This has been attempted by some modern scholars and lawyers in the modern age through a process known as *takhyīr*, that is, choosing opinions from one jurist or the other. The process known as *talfīq* or the fabrication of an opinion by using bits and pieces from different rulings is equally futile. The only way the law in the flexible sphere can be developed is through reasoning from general principles arising from the fixed part of the law.

5. It also becomes obvious that what is binding upon us is the fixed part of the law. Nothing is binding upon us from the flexible sphere that changes with the times, unless we consciously follow a system of precedents. If the rulers in the earlier ages chose to establish *maẓālim* courts, it is not binding upon us to do the same. We can possibly establish better and more effective institutions today, as long as the underlying principles are

Islamic. On the other hand, there are areas where strict boundaries are not visible, yet the jurists did considerable work on them, because they were more interested in the operation and adoption of certain essential general principles. Take the case of the law of sales. Many modern writers try to build up an entire theory of contracts from the work of the *fuqahā'*. What the *fuqahā'* did was to apply some fundamental principles that govern commercial transactions to the transactions that existed during their times. These, until a few centuries ago, were transactions that centered around a small market-place, a bazaar if you like, or around traders leaving on long journeys with caravans. Today transactions have changed, market-places have changed, and the world has become one big market. What is basically relevant in this area are general principles used by the *fuqahā'*. These principles are clearly stated in the Qur'ān and the *Sunnah*. This is not to say that some of the rulings of the earlier jurists in this area will not be relevant, but on the whole these decisions should be used to understand the operation of general principles and not always followed literally.

6. The idea of the two conceptual spheres will help the Muslim minorities living in secular or non-Muslim countries to know that it is the fixed part of the law that they have to follow, and it is from this that they have to draw their inspiration. Their leaders and scholars may guide them according to the established schools of law that these individuals follow.

7. Finally, the two spheres tell us that our *ijtihād* today is to be directed more toward the flexible sphere rather than the fixed sphere. The fixed sphere has been developed to its limits and a rich treasure of opinions exists within the established schools. Occasional new cases may arise in this area too, but these can be settled with ease in accordance with the precedents left by the *fuqahā'*. In the flexible sphere Muslim states should adopt valid and acceptable methods of interpretation that the *fuqahā'* have laid down for them, methods that are suitable for the growth of a living and vibrant law. This will be discussed in some detail at the end of the book, after the major theories of interpretation have been examined in the second part of this book.

Part II

Theories of Interpretation

Chapter 9

Common Features of Interpretation

The general view currently prevailing among Muslim scholars, as well as Western writers, is that legal theory in Islamic law, which is represented by the discipline of *uṣūl al-fiqh*, did not exist before al-Shāfi'ī. It is true that al-Shāfi'ī was the first jurist to systematically record in his book *al-Risālah* the general rules of interpretation. In addition to this, he produced a number of works in which he stated his juristic position in great detail as compared to the founders of the earlier schools, and tried to show the soundness of his method. The systematic recording of his principles was indeed a significant event. This, however, does not mean that the schools or jurists before him lacked a methodology that they could use to interpret the texts or sources of the law.

The earlier jurists, whether they belonged to a school or were independent, did have a clear methodology for the interpretation of texts. No major attempt, however, has been made in modern times to understand their systems.[1] The focus has been on al-Shāfi'ī and on the discipline of *uṣūl al-fiqh* that was developed and refined after him.

The reason for the importance given to al-Shāfi'ī's work is that later Ḥanafī and Mālikī jurists expressed the positions of their schools in the format adopted by al-Shāfi'ī or his school, and this gave the subject of *uṣūl* a uniform appearance. Their views are, therefore,

[1] As far as we know, the only systematic effort has been made by Dr. Zafar Ishaq Ansari in his doctoral dissertation, *The Early Development of Fiqh in Kūfah*, at McGill University, Montreal, 1966.

considered as deviations from, or variations of, the views expressed by al-Shāfi'ī. This has led to the study of the discipline of *uṣūl al-fiqh* as a uniform theory. As a consequence, we notice that when modern scholars describe an issue within *uṣūl* they tend to give the opinion of one school and the opposing view of the majority (*jumhūr*) in comparison. This kind of comparative study may be helpful in understanding that particular issue,[2] but it conceals the views of the schools as a whole.

Another reason for the merger of views in books on *uṣūl* is that the earlier jurists, especially those of the Ḥanafī school, were accused of employing their personal opinion or *ra'y* as well as *istiḥsān* in the interpretation of sources. *Istiḥsān* was condemned by al-Shāfi'ī as illegitimate. This appears to have forced the later Ḥanafī jurists to express their principles of interpretation in the format and fashion employed by al-Shāfi'ī when their predecessors had not done so.

The result of all this is that the concept of viewing the works of independent jurists as separate theories has not developed. The maximum that one finds is the listing of principles of the founder of a school in books on legal history. Today, there is no work available that analyzes the views of each school as a separate and internally consistent theory of interpretation. One reason for the lack of such a work could be that the merger of different views, in many earlier works as well as in most of the modern, makes the extraction of the views of each school in the form of independent theories a formidable task. Further, any attempt to explain the theories separately must take into account the principles of interpretation that are relevant, the development of the law, the history of *uṣūl*, and Islamic legal history in general through which broad trends can be identified. The situation becomes increasingly complex when the purpose is to render an explanation of the theories that would be useful for the general reader who is not acquainted with the details of these areas of study. One does not know, therefore, where to start. Is one to begin with developments in *uṣūl al-fiqh* or with those in the law? Should the broad features of the theories be outlined first or the details? The situation is further aggravated if the general view or approach adopted is somewhat different from the generally prevailing views.

In any case, the method adopted here is to first state, however briefly, some common details of the rules of interpretation. It is expected to give the reader a general idea about the operation of the

[2]This too is doubtful, in the opinion of this writer.

system of interpretation in Islamic law. This will be followed, in consecutive chapters, by a description of the broad features of the main theories. Details from legal history will be woven into the description of the broad features. The next chapter will, therefore, deal with the broad features of theories that employed general principles. The chapter following it will describe the strategy of the strict theories of interpretation. This will be followed by a description of the theory formulated by Imām al-Ghazālī, a theory that is constructed upon the purposes of the law. The purposes of the law also merit separate treatment. A chapter will, therefore, be devoted to their analysis and refinement. Finally, an attempt will be made to identify methods in traditional theories that are likely to be more useful for interpretation in the present age, not only for the scholars of Islamic law, but for judges engaged in the adjudication of cases in accordance with Islamic law in certain countries. This will be undertaken in part three of the book.

9.1. Interpretation in general

Understanding different theories of interpretation is relatively easy if common and general features of interpretation in Islamic law are explained first. This may also help the reader who has no prior knowledge of Islamic law or of *uṣūl al-fiqh*, a discipline that furnishes the methodology for the derivation of laws from their sources.

Each book on Islamic legal theory contains the statement that there are four sources of Islamic law. By this the authors mean that there are four sources that are unanimously accepted by all the Sunnī schools, as distinguished from Shi'ī legal theory and the views of the now extinct Ẓāhirī school. Agreement over these four sources, however, does not justify the designation of this acceptance as a "common theory," also known as the "classical theory" in Western literature on Islamic law. There are other sources of law, but these are accepted by some schools and not by others or they are assigned a different binding strength. This statement about four sources was first made by the illustrious jurist Imām al-Shāfi'ī, the founder of a school, and in some ways the pioneer of the science of *uṣūl al-fiqh*. In a restricted sense, this statement is true, as will be obvious later, because several principles sometimes considered independent can be accommodated within a wider form of *qiyās* or analogy, the fourth source of Islamic law.

The first source of Islamic law is the Qur'ān, which is considered by Muslims to be revelation, that is, the word of Allāh as revealed to Muḥammad. The second source is the *Sunnah* (practice)[3] of the Prophet as contained in *ḥadīth* literature, which is its written record.[4] These two sources are considered the primary sources. The third source is *ijmā'* (consensus of opinion), with its varying interpretations whether it is the consensus of opinion of the Companions of the Prophet alone, consensus of the entire community, or consensus of the jurists in each age on a rule of law. The last meaning, that is, agreement of jurists on a rule of law, was accepted by all the schools, even the Shāfi'ī school after al-Shāfi'ī. For al-Shāfi'ī himself, the principle of *ijmā'* was not a very useful principle, because he believed that a consensus of opinion of all jurists was difficult to ascertain. The fourth source is *qiyās*. All this is well known.

It is also known, but seldom emphasized, that the Sunnī schools accept other sources of law, though agreement over these is not unanimous. Each school accepts some of these sources, but rejects others. These sources are: opinion of a Companion, *istiḥsān*, *istiṣḥāb*, and *istiṣlāh*. Custom (*'urf*) is also accepted as a source insofar as it means the custom prevailing during the period of the Prophet, which is used to assign meanings to terms in the texts, that is, it is used to discover the intention of the Lawgiver. This is not to be confused with customs that may be prevailing in other ages and in territories other than Arabia of the Prophet's time.[5] These disputed sources go a long way in leading each school to different opinions. In combination with this, disagreement over rules of interpretation employed by each school is what gives rise to separate and distinct theories of Islamic law, as will be explained in what follows.

Despite the existence of these separate sources, al-Shāfi'ī insisted that there are four sources. He also equated *ijtihād*, or interpretation, with the principle of *qiyās*. Al-Shāfi'ī's intention could have been to restrict the role of *ijtihād* to the principle of *qiyās* alone. Later jurists probably found this to be too restrictive and so tried to accommodate all other methods or sources, like *istiḥsān*, *istiṣḥāb*, and *istiṣlāh* within

[3] According to the Shāfi'ite theory, this too is a form of revelation (*waḥy*). The Qur'ān is revelation in both word and meaning, while the *Sunnah* is revelation in meaning alone.

[4] One *ḥadīth* may contain more than one *sunah*.

[5] Such customs would be treated like all other new cases awaiting decision, and judgment would be rendered about their validity in the light of the *shari'ah*. For a detailed exposition about *'urf* see al-Shāṭibī, *al-Muwāfaqāt*, iv, section on *'urf*.

the fold of *qiyās*. An examination of this principle later is expected to show how far this is true.[6] The only principle that could not be included within *qiyās* was the opinion of a Companion, but the Shāfi'ī school does not consider this source to be binding. What this means is that al-Shāfi'ī considered the opinion of a Companion to be equivalent to the exercise of *qiyās* by the Companion, therefore, when such *qiyās* conflicted with a *khabar wāḥid* (a tradition narrated by one or two persons in the first three generations, even if it became widely known later) it was to be rejected. The Ḥanafites, on the other hand, consider it to be a precedent (like a ruling by a higher court, which is ususally binding on lower courts) established on the basis of the superior knowledge of the Companion, who knew what texts had been abrogated and what principles preferred over others. This makes it authoritative and binding for the Ḥanafī jurists.[7] Further, some schools rejected *istiḥsān*.

For the purposes of the present discussion, however, the views of all schools will be considered collectively where necessary, but again this does not imply that there is a common legal theory in Islamic law. The general idea of "sources of law" needs to be qualified too. The Qur'ān and the *Sunnah* are the two primary sources. The remaining sources are actually principles that represent different methodologies used by jurists to derive the law from the two primary sources. These principles are considered sources so as to indicate whether a rule derived through them will be binding on others. By others here, do we mean laymen or qualified jurists? A rule derived by one jurist through *qiyās* will not be binding on another jurist, who is under an obligation to follow his own *ijtihād*. For the layman, the meaning of source is not important, for he is not required to inquire into the sources; his source is the jurist. The meaning of layman includes those judges who may not be qualified *mujtahids*.[8] *Qiyās*, therefore, is a principle of interpretation that is valid for those who accept it as such. It does not have the same force as the *Sunnah*, for example, the texts of which are binding for all jurists.

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[6] Part of the discussion about *qiyās* will be undertaken in this chapter and part in Chapter 12.

[7] See al-Dabūsī, *Ta'sīs al-Naẓar* (Cairo, n.d.) 55, for the difference between the Ḥanafites and the Shāfi'ites. He has expressed this issue in the form of a principle.

[8] This term may today be applied to judges of the lower courts as a group, recognizing that there may theoretically be individual judges among them who are qualified enough to be called *mujtahids*.

9.1.1. The law is always the *ḥukm* of Allāh

The fundamental idea that haunts Islamic legal theory is that a rule of law, when expressed by a qualified jurist (*mujtahid*), is not to be taken merely as his opinion, but as the *ḥukm* of Allāh, a *ḥukm* that is sacred and is to be obeyed, even though it has been discovered by the jurist.[9] Stated another way, the jurist who derives the law from the texts bears a grave responsibility, for he is not issuing opinions as it pleases his fancy, but is deriving rules that will be considered the law of Allāh. This point cannot be overstated. Because of this, no Muslim jurist would like to be accused of framing the law in accordance with his "personal opinion (*ra'y*)."[10] The jurist does not make this law; he discovers it from the authoritative sources of the law. Thus, any tampering with the law by an unqualified person is deemed a serious matter. Most discussions in the works of jurists revolve around this point, and the validity of a source of law depends on the issue whether the *aḥkām* of Allāh can be proved through such a source.

The methodology that ensures that valid sources are used, in equally valid ways, to discover the law is called *uṣūl al-fiqh*, and this methodology varies from school to school, except in the case of acceptance of the four sources, as stated earlier. The term *uṣūl* (lit. roots) may be used to refer to a number of things, but is generally understood to mean "sources." For the jurist, however, this term implies "a body of principles," which he uses to interpret the texts. The use of the word "source" in the Western sense of the term fails to do justice to this important point. These principles are formulated in the form of general propositions whose major premiss serves as the principle. Such a principle is sometimes referred to as a *qā'idah uṣūliyah*. For example, a proposition may be stated as follows:

> The *aḥkām* of Allāh are to be found in the Qur'ān. The Qur'ān is a source of law. Thus, each time a *ḥukm* is found in the Qur'ān, it is proved as the *ḥukm* of Allāh.[11]

The principle that emerges, and which is usually stated, is that *the Qur'ān is a source of law*. The emphasis for the jurist, however, is

[9] See al-Shāfi'ī, *al-Risālah*, 39, 476.

[10] The allegation made by the Shāfi'ites that the Ḥanafī jurists used *ra'y* to frame laws is to be understood more in terms of school bias rather than in terms of deviating methodology.

[11] Ṣadr al-Sharī'ah, *al-Tawḍīḥ*, i, 45.

always on the last sentence; namely, *each time a ḥukm is found in the Qur'ān it is proved as the ḥukm of Allāh*. The same is the case with the *Sunnah* as well as *ijmā'*; when it is said that they are sources of law, the emphasis is identical. While there is no hesitation in accepting the *Sunnah* as a source of law in this meaning,[12] the case of *ijmā'* is somewhat different. The jurists, therefore, spend considerable time in proving through the texts of the Qur'ān and the *Sunnah* that *ijmā'* is a valid source of law, and any *ḥukm* proved through it should be accorded the status of the *ḥukm* of Allāh. The situation in the case of *qiyās* becomes even more difficult, especially when there has been some hesitation in accepting it, with the Ẓāhirī school rejecting its validity completely. The remaining schools accepted *qiyās* as a valid source, after giving detailed arguments from the texts about its validity. Thus, when the jurist maintains that analogy (*qiyās*) is a source of law, the emphasis will always be on the fact that "each time analogy is successfully used to discover the law (from the Qur'ān and the *Sunnah*) a *ḥukm* of Allāh is discovered or proved."[13] This is so as *qiyās* is merely a method of discovering a law laid down in the Qur'ān and the *Sunnah*, and the law is actually being proved from the two primary sources. It is in this sense that the four sources are designated as definitive (*qaṭ'ī*), that is, if a *ḥukm* is proved through these sources it will certainly be accepted as the *ḥukm* of Allāh.[14]

The jurist, in this way, arrives at four fundamental principles of interpretation related to the four acceptable sources of the law. These are also termed as *adillah ijmālīyah*, that is, comprehensive sources that contain within them a large number of detailed individual or specific evidences, the *adillah tafṣīlīyah*. In addition to this, each school formulates principles for the additional sources that it accepts and acts upon. The emphasis is the same as for the first four sources with respect to the resulting rule being the *ḥukm* of Allāh. This body of rules or principles is known as *uṣūl al-fiqh*. These, however, are only part of a larger whole. A large number of such principles are derived from the rules of literal interpretation that are also part of *uṣūl al-fiqh*, and it is to these that we may turn now.

[12] Because it is considered revelation in meaning.

[13] Ṣadr al-Sharī'ah, *al-Tawḍīḥ*, ii, 45.

[14] al-Ghazālī, *al-Mustaṣfā*, ii, 279. He states that *qiyās*, on the whole, is a definitive (*qaṭ'ī*) principle.

9.1.2. The *ḥukm* of Allāh and literal methods

The primary sources, that is, the Qur'ān and the *Sunnah*, considered collectively, convey the *aḥkām* of Allāh through three channels: words, acts, and approvals.[15] These channels contain commands or proscriptions. The text demanding the commission of an act uses either the form of a command (*amr*) or the form of a report implying a command. Similarly, the authority demanding omission of an act employs the form of a proscription (*nāhy*), or the form of a report implying proscription. If words occur in the sources in these forms, is the demand for the commission of an act to be interpreted as an obligation (*wujūb*) or a recommendation (*nadb*)? This, in the main, depends on the principle followed by the jurist or by his school. One school may say that "the command initially implies obligation, unless another evidence indicates otherwise."[16] Another jurist may uphold the principle that it initially indicates a recommendation, or even permissibility, unless another evidence converts it to an obligation. The variation in opinions on this rule depends on the way the jurist believes that the true intention of the Lawgiver will be ascertained. Similar rules are formulated for proscriptions.

The kinds of words through which the *aḥkām* are related to acts or entities are two: general (*'āmm*) and particular (*khāṣṣ*).[17] These are further classified into four types: the general word when applied to all its categories, the particular word applied to its single category; the general word when its application is particular, and the particular word when its intended implication is general.[18] Included in these is the use of the higher order meaning to denote the lower order meaning, and the employment of the lower order meaning to indicate the higher order meaning, as well as the indication of equivalent meanings. In other words, the general word sometimes acts like itself and sometimes like the particular word. The same is true of the particular word; that is, it may act like itself or it may act like the general word. The examples that follow attempt to explain these intricate concepts.[19]

For instance, in the verse of *zakāh*, "Take alms of their wealth,

[15] Ibn Rushd, *Bidāyat al-Mujtahid*, i, 3.

[16] Al-Sarkhsī, *Uṣūl*, i, section on *amr*.

[17] Ibn Rushd, *Bidāyat al-Mujtahid*, i, 3.

[18] Al-Shāfi'ī, *al-Risālah*, 52–79.

[19] These meanings will become clearer when we later attempt to understand the meaning of *qiyās*.

wherewith thou mayst purify them and mayst make them grow,"[20] the term "wealth" is used as a general word without any restriction. The meaning it conveys is that *zakāh* is to be levied on all kinds of wealth. We know, however, from other provisions of the *sharī'ah*, that *zakāh* is levied on certain kinds of wealth alone.[21] The word "wealth" will, therefore, be read to mean certain kinds of wealth and not all kinds without restriction. The general word in this example is meant to convey a particular or a restricted meaning. It is obvious that in this case the restricted implication of the word "wealth" is dictated by other provisions of the law.[22]

The example of a particular word having a general intent is evident in the verse, "Say not 'Fie' unto them nor repulse them, but speak to them a gracious word."[23] The word "fie" here has a particular implication, but we know that if merely saying "fie" to parents is prohibited, all other aggressive and rude behavior must also be prohibited. The word "fie" is particular, but it has a general implication. It is also a case of the indication of a higher order meaning through the lower, as the prohibition includes beating, abuse, and whatever is more grievous.[24] The other cases of general and particular words should be obvious.

The principles of interpretation related to these words may vary within schools. For example, the Ḥanafī rule is that "a general word passes the *ḥukm* of Allāh contained within it to all its categories *with a certainty*, unless restricted by another evidence" that is, initially it is definitive (*qaṭ'ī*).[25] The Shāfi'ī rule is that it is probable from the beginning, that is, we cannot be certain that the *ḥukm* has been passed for application to all the categories. There is also the Ḥanafī rule that the general implication is lost due to equivocality (*ishtirāk*).[26] Such differences again lead to a difference in the derived opinion.

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[20] Qur'ān 9 : 103

[21] Al-Shāfi'ī, *al-Risālah*, 176, 187.

[22] Ibid. 187-196, 196.

[23] Qur'ān 17: 23

[24] Ibn Rushd, *Bidāyat al-Mujtahid*, i, 2.

[25] Al-Sarkhsī, *Uṣūl al-Sarakhsī*, i, 130; Ṣadr al-Sharī'ah, *al-Tawḍīḥ*, i, 79.

[26] Al-Sarakhsī, *Uṣūl al-Sarakhsī*, i, section on *'āmm* and *khāṣṣ*.

From another aspect the entities or acts to which the *ḥukm* is related may be indicated by it through a word with a single meaning.[27] This is known as *naṣṣ* (explicit). There is no dispute about the obligation of acting in compliance with such a *ḥukm*.[28] It may also be indicated through a word having more than one meaning, and is of two types. The word may indicate an equal disposition toward different meanings. This is known as *mujmal* (having equal probabilities).[29] There is no dispute that it does not obligate a *ḥukm*, as long as it is maintained in this form. Further, it may be inclined toward some of these meanings more than it is toward the others. In such a case, it is known, with reference to such indicated meanings, as *ẓāhir* (manifest, apparent), and with reference to the other (probable) meanings as *muḥtamal* (probable).[30] If such a word is used in an unqualified sense it is to be applied to its apparent meaning unless another evidence indicates its application to one of its other probable meanings.[31]

The obscure or un-detailed word needs elaboration (*bayān*), which is usually available through the *Sunnah*. This may lead to a difference of opinion, because the jurists may employ different evidences for the explanation. Some other reasons for a difference of opinion may be due to equivocality of words (*ishtirāk*), or the equivocality because of the use of the definite article "*al*" accompanying the genus of an entity, whether the whole is implied or a part, or because of the equivocality of the words used for commands and proscriptions.[32] Yet another reason could arise from what is known as (*dalīl al-khiṭāb*) or the indirect indication of the communication, especially when the jurist tries to understand from the obligation of the *ḥukm* for a thing, the negation of things besides it, and from the negation of a thing the obligation of all things besides it.[33] For example, when the jurist tries to conclude from the words of the Prophet, "In the *sā'imah* (freely pasturing animals) out of cattle there is *zakāh*," that there is

[27] Ibn Rushd, *Bidāyat al-Mujtahid*, i, 3.

[28] Ibid.

[29] Ibid. ; Al-Ghazālī, *al-Mustaṣfā*, i, 345.

[30] Ibn Rushd, *Bidāyat al-Mujtahid*, i, 3. The division of words into *naṣṣ*, *mujmal*, *ẓāhir*, and *muḥtamal* is in conformity with the system of the Mutakallimūn. The division is slightly different in the system of the Ḥanafites, with some practical consequences. For a modern, but good analysis of these differences see Muḥammad Adīb Ṣāliḥ, *Tafsīr al-Nuṣūṣ* (Baghdād, n.d.).

[31] Ibn Rushd, *Bidāyat al-Mujtahid*, i, 3.

[32] Ibid.

[33] Ibid. In technical terms, it is called *mafhūm al-mukhālafah*.

no *zakāh* in cattle other than the *sā'imah*. This is the method used by the majority.

The classification and categories of words described above conform with the methodology of the majority. The Ḥanafī school has its own terminology for describing certain categories of words, and they also have somewhat different methods for extending the meanings of the text. These are what are called the *dalālāt*.[34]

The principles stated above, that is, those related to the four unanimously accepted sources, the opinion of the Companion, the implications of the command (*amr*) or proscription (*nahy*), the definitive or probable meaning of the general word, the meanings implied through *naṣṣ*, *ẓāhir*, or *mujmal* words or other classifications of words, when taken together indicate what kind of theory is adopted by a school. Not mentioned here are disagreements over the principle of *ijmā'*, about the doctrine of abrogation (*naskh*), the position taken with respect to the *khabar wāḥid* (the individual narration), and the different views about preferring one evidence over another in case of conflict (*tarjīḥ*). What sources are accepted by a school, and what is the nature or form of principles adopted, depends on the founder of the school (or what may have been attributed to him by later jurists). The other jurists within this school are not authorized to change these rules. This is why the founder is known as a *mujtahid muṭlaq*, or the absolute *mujtahid*, who is not restricted in his choice of these principles. It is to be assumed that the set of principles adopted by a school contains principles that are compatible with each other, and ensure a consistent development of the law. The set of principles or individual principles of one school may not exhibit such compatibility with those of another school. Moving between schools is, therefore, not appreciated insofar as it amounts to following a law that is not internally consistent.[35]

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[34] See, e.g., Al-Sarakhsī, *Uṣūl al-Sarakhsī*, i, section on *dalālāt*; Ṣadr al-Sharī'ah, *Tawḍīḥ*, i, 241.

[35] This is also related to the issue whether each *mujtahid* is right even when the opinions on the same issue differ. The Ḥanafīs maintain that only one jurist is right and the rest are wrong. Ibn Nujaym states: "If one asks us about our school and a rival school, it is necessary for us to say that our school's opinion is correct with a slight chance that it could be wrong, while the opinion of our rivals is wrong with a chance that it could be right." Ibn Nujaym, *al-Ashbāh wa al-Naẓā'ir* (Bayrūt, 1980) 381.

9.1.3. *Qiyās* and the *ḥukm* of Allāh

All the above rules apply when the case under examination falls within the ambit of the text or its meaning extended through literal implication. When the texts do not cover a case, expressly or by implication, the method used is analogy (*qiyas*). *Qiyās* is the assigning of the *ḥukm* for a thing to another thing, about which the law is silent, due to its resemblance to the thing for which the law has obligated the *ḥukm* or due to a common underlying cause (*'illah*) between them. It is for this reason that legal analogy is of two types: *qiyās al-shabah* and *qiyās al-'illah*.[36] The easiest way to understand the analogy used by the jurists is to compare it with the particular word implying a general meaning. The difference is that analogy can be undertaken only in the case of a particular word that implies just its single category. The other similar cases are then joined with it, that is, those not covered by the text are joined to the one that is, due to a resemblance between them, not through an implication of the word. This is so because the extension of the *ḥukm* to an unstated, yet implied, category is not analogy, but falls within the connotation of the word (*dalālat al-lafẓ*). These two kinds of extensions of the *ḥukm* to the unstated entity are very close as in both there is a joining of the explicit and the implicit cases.[37] According to al-Shāfi'ī, this too is analogy, and he gives it the name of *qiyās al-ma'nā*.[38]

This may be explained through examples. In an example above, a verse of the Qur'ān prohibits saying "fie" to parents. This is a specific case (*khāṣṣ*). However, this specific case implies other more grievous cases, like the person hurling abuses at his parents or one abusing them physically. The lower-order meaning here yields other higher-order meanings and extends the prohibition to them. This literal method is called *qiyās al-ma'nā* by al-Shāfi'ī and his school, because we extend the rule from one specific case to one or more specific cases implied by the text. The texts may use a specific (*khāṣṣ*) word in which neither higher-order meanings nor lower-order meanings are implied, and the only way the *ḥukm* can be extended is through *qiyās al-'illah*. Take the case of the word *khamr* (wine). If the word *khamr* is treated as a generic term covering things that veil the mind or affect

[36] Ibn Rushd, *Bidāyat al-Mujtahid*, i, 3. Al-Shāfi'ī said that the two types of analogy are *qiyās al-ma'nā* and *qiyās al-shabah*. Alshāfi'ī, *al-Risālah*, 479.

[37] Ibn Rushd, *Bidāyat al-Mujtahid*, i, 3.

[38] This at least is the Shāfi'ite view. Al-Shāfi'ī, *al-Risālah*, 479. See also al-Ghazālī, *al-Mustaṣfā*, ii, 274.

the brain, then, it could be extended to all higher-order, lower-order, or equivalent meanings. This would cover all kinds of liquor causing the same effect. Such extension would be through *qiyās al-ma'nā*. This is not acceptable to some in the case of the word *khamr*, especially the Ḥanafīs, who insist that *khamr* is not a generic term, but is a specific name used for wine alone, and names—like *khamr*, Zayd, Bakr—cannot be assigned meanings; they are just names. The Shāfi'ites say that names can be viewed generically, but even if it is conceded that they do not we can always, they say, find an underlying cause when the specific term used is not generic, and in the case of *khamr* the underlying cause (*'illah*) is intoxication. Thus, the Shāfi'ites would prohibit every intoxicating liquor by extending the *ḥukm* of *khamr* to it. By doing this they move from the category of *qiyās al-ma'nā* to that of *qiyās al-'illah*.[39]

Qiyās al-'illah has its limitations too, as the *'illah* has to be an objective attribute that does not vary from person to person, or with the circumstances. This can be shown by carrying on the argument in the case of *khamr*. Thus, the Ḥanafites might say that "intoxication" or "being an intoxicant" is not a valid *'illah* for *khamr*, for had it been the reason for prohibition, the drinking of one drop of wine would not have been prohibited, but it is, even though it does not intoxicate. The Ḥanafites, therefore, say that *khamr* is prohibited for itself, there being no underlying cause for its prohibition, or at least one we can understand, and drinking even a drop of wine is prohibited. This offense, they add, is to be distinguished from the offense of becoming intoxicated, which is also prohibited, but by traditions from the Prophet, not the verse of *khamr*.

The Shāfi'ites insist that "intoxication" is a valid *'illah* for *khamr*, because the consumption of small quantities leads to drinking more or larger quantities. The Ḥanafites would reply that by saying this you have moved from an objective attribute to one that is subjective; you have moved from the *'illah* to the *ḥikmah* (wisdom) behind the verse, the "spirit of the law." *Ḥikmah*, they argue, is not valid as an *'illah*, because it may mean one thing for one person and another for another person. Further, it could vary according to the circumstances, like hardship in the case of prayers during a journey.

[39]There are traditions which prohibit intoxicants explicitly. In this case it would not be analogy at all, but the application of the literal meaning. The example is being used to illustrate the meaning of *qiyās*. The *ḥukm* for intoxicating liquors other than *khamr* is derived directly from the literal implications of traditions.

A person riding on horseback may face some hardship, while another person travelling by a comfortable train or ship may not. The *'illah*, therefore, is chosen as travel (*safar*), which treats everyone equally and permits the curtailing of prayers. It is a stable underlying cause. The Shāfi'ites, still not content, say that there is another aspect to this *'illah* of intoxication. Is it not mentioned in the verse, they say, that wine and gambling lead to enmity and hatred? Is this not a convincing (*mukhīl*) reason that even a drop of *khamr* be prohibited, and does not intoxication appear as a *munāsib* (suitable) reason that conforms with the general practices (*taṣarrufāt*) of the law. But, at this point we enter into the realm of the new theory developed by al-Ghazālī, which will be taken up later.

Strict *qiyās* is a narrow method of extending the *ḥukm* when it is not based on the *ḥikmah*, and is different from analogy used in modern law. *Qiyās al-shabah*, on the other hand, is not acceptable to all the jurists, though Ibn Rushd believes that it has been used often. An example of a valid form of *qiyās al-shabah* is given by al-Shāfi'ī himself, who calls it *ijtihād*.[40] A person who violates the prohibition of hunting during the pilgrimage is required to slaughter a similar (*mithl*) animal.[41] For example, a camel for killing an ostrich, or a sheep for killing a gazelle. Determining what is similar requires *ijtihād*. This is undertaken through *qiyās al-shabah*. The word *mithl* (similar) in this verse implies that a search is to be undertaken for a similar animal that can be turned in as compensation. This is a search outside the texts and not within them for a rule of law. Compared to this is the search for the direction of the *qiblah* for a man travelling in a desert on a cloudy day or night.[42] This form of *ijtihād*, one may point out, does not require jurists, but experts in other areas. However, it has been given given considerable attention by al-Shāfi'ī in the discussion of *qiyās* in his book *al-Risālah*. The later jurists, when their discussions had reached some level of sophistication, gave this method the name of *taḥqīq al-manāṭ*, that is, the verification of the attributes in the case presented for decision. The *qiyās al-shabah* rejected by other schools is not this limited method, but the extension of the *ḥukm* on the basis of similarity between apparent attributes that cannot serve as the *'illah*.[43]

[40] Al-Shāfi'ī, *al-Risālah*, 490-92.

[41] Qur'ān 5 : 95.

[42] Ibid. 487-89.

[43] Al-Ghazālī, *Shifā' al-Ghalīl*, section on *qiyās al-shabah*.

The important point to note here is that for al-Shāfi'ī himself there were only two valid forms of *qiyās*: *qiyās al-ma'nā* and *qiyās al-shabah*. He states this in *al-Risālah* as well as in *al-Umm*:

> *Qiyās* is undertaken from two aspects. The first is when a thing is included in the meaning (*ma'nā*) of the *aṣl*. There is no disagreement about this. (Then) there may be a thing which has some similarity to those in the sources. It is, therefore, associated with the one closer to it or greater in similarity (*shabah*).[44]

The apparent meaning of this statement would be that al-Shafi'ī does not permit even the regular type of *qiyās* known as *qiyas al-'illah*, as described above. This would make his method of *qiyas* very narrow, which would not be very different from the methods of the Ẓāhiris, because *qiyās al-ma'nā* is nothing more than a literal implication of the text. On the other hand, al-Shāfi'ī confidently maintains that any case faced by Muslims can be covered under these methods. We have not been able to trace in his book *al-Risālah*, any example that can be classified as an explicit case of *qiyas al-'illah*. All the examples he gives are either those of *qiyās al-ma'nā* or of the limited form of *qiyās al-shabah* that he approves. The situation in *al-Umm* is somewhat different, although there too he maintains that there are the only two types of analogy.[45] It is possible that the later Shāfi'ite jurists were able to squeeze in *qiyās al-'illah* as well as methods of discovery of the *'illah*, like *ikhālah*, into the practices of the school by extending the meaning of *qiyās al-ma'nā*. Perhaps, this is also the reason why it took Shāfi'ite law and legal theory two and a half centuries to mature. An answer to this issue needs extensive research and access to works of very early Shāfi'ite jurists, and these may not be available.

Consensus (*ijmā'*) relies on one of the channels mentioned above and is not an independent source. The evidence on which reliance is placed for purposes of *ijmā'* is called the *sanad* of *ijmā'*. Ibn Rushd maintains that had it been an independent source it would have amounted to the establishment of additional law after the time of the Prophet, as it would not have been based on one of the legally valid principles.[46]

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[44] Al-Shāfi'ī, *Al-Risālah*, 479. See also *al-Umm*, vii, 85.

[45] See *al-Umm*, vii, 85.

[46] Ibn Rushd, *Bidāyat al-Mujtahid*, i, 4.

To recapture some of the ideas listed above, we may state a few of the rules from the large body of principles that a jurist carries in his armor before he attempts to interpret the texts. The principles are stated in our own language for the sake of simplicity and may be stated somewhat differently in the books of *uṣūl*. The purpose is to have a general idea.

1. Each time a *ḥukm* is discovered in the Qur'ān it is said to be proved. [Unanimous]
2. Each time a *ḥukm* is discovered in the *Sunnah* it is said to be proved. [Unanimous]
3. Each time a *ḥukm* is discovered though *'ijmā'* it is said to be proved. [Unanimous, though al-Shāfi'ī had some reservations]
4. Each time a *ḥukm* is discovered through *qiyās* it is said to be proved. [Unanimous]
5. Each time a *ḥukm* is discovered through the opinion of a Companion it is said to be proved. [Not unanimous]
6. Each time a command (*amr*) is found in the texts it conveys an obligation, unless another evidence indicates the contrary. [Not unanimous]
7. Each time a proscription (*nahy*) is found in the texts it conveys a prohibition, unless another evidence indicates the contrary. [Not unanimous]
8. Each time a *ḥukm* is expressed in general terms it applies to all its categories with a certainty, unless restricted by an equally strong evidence. [Not unanimous]
9. The *ḥukm* is proved through the persuasive power of the *dalīl* and not through the number of evidences. [Not unanimous]

These are only a few rules out of a large body of rules, sometimes called the *qawānīn uṣūlīyah*, that have been stated so that the reader may get an idea of the tools employed by the jurists.

Knowing these rules is only part of the task, and the jurist is expected to have in his mind the entire structure of the law, the set of facts facing him, and all the causes and conditions that either affirm the *ḥukm* or create an exemption. In addition to all this, the jurist must be proficient in the Arabic language, for not only are the sources in Arabic, there are many rules relevant to language that may affect interpretation. Above all, the jurist can only begin to use these rules once he has all the textual evidences related to the issue before him, and he has decided which evidences override others, that is, abrogate them or restrict them. The task of the jurist is not

easy and it needs many skills and prolonged training to be able to interpret the texts for the derivation of the law.

Chapter 10

Theories of General Principles

In this chapter we shall examine theories that are based on the general principles of Islamic law. Why this title has been chosen should be obvious by the end of this chapter. It was mainly the Ḥanafī school that used this methodology. Mālik's school, however, had a similar methodology, not only because the two jurists were contemporaries, but also because the sources of law or principles of interpretation used by both schools have much in common. Some of the Mālikites, for example, accept the opinions of Companions as a source of law.

It is claimed by some modern scholars, like Abū Zahrah, that the Ḥanafites had different *uṣūl* than those used by al-Shāfi'ī. The Ḥanafites, they say, derived their *uṣūl* later on from the derived law, that is, they constructed their methodology from the derived law through a reverse process. They also maintain that the *uṣūl* of the Ḥanafis were more like the *qawā'id fiqhiyah* or the general principles of the law. If these statements are intended to mean that Ḥanafī methodology was inferior in some way, then, nothing could be farther from the truth. The use of these general principles reflects the real strength of the Ḥanafite method. My purpose, however, is not to show that one methodology was better than the other or that one jurist was superior to others. They were all great jurists and each made his own contribution to the system. Further, each method of interpretation may have a distinct function to perform in the modern age.

Unfortunately, in the middle period of Islamic legal history, Abū Ḥanīfah and his school were subjected to a propaganda that seems

unjustified. The truth is that the Muslim world may never again produce a jurist of his stature, and jurists who followed later, whatever their affiliation, can match his skills with great difficulty. This in no way means that the other great jurists were somehow less in stature. Yet, this chapter may in some ways be considered an indication of what the Muslims owe to Abū Ḥanīfah and his method.

10.1. Background

The history of Islamic law is dominated by a confrontation between two groups: the Ahl al-Ra'y and the Ahl al-Ḥadīth.[1] The former term is applied to the majority of Muslim jurists of the first two centuries of Islam, who are accused of injecting their "personal opinion" (*ra'y*) into the law instead of relying on the *Sunnah* (acts and decisions) of the Prophet. Among the surviving Sunnī schools of law, the Ahl al-Ra'y are considered, on the whole, to belong to the the Ḥanafite school, and the founder of this school, Abū Ḥanīfah, is designated as the champion of *ra'y*.[2] The Mālikites and the founder of the Mālikī school, Mālik ibn Anas, are considered to belong to the latter group of jurists, who are said to have based their opinions on the *Sunnah* of the Prophet. The Shāfi'ī, Ḥanbalī, and the now extinct Zāhirī school are also considered to belong to the latter group.

Determining which early jurist belonged to the group using *ra'y* was a favorite pastime of the later Shāfi'ī jurists and of the traditionists, but most of their tirades were directed against Abū Ḥanīfah.[3] So effective and powerful was the propaganda launched against the jurists using *ra'y* that we find even modern Western scholars like Goldziher succumbing to it. After quoting a large number of opinions from these propagandists, one of which he interprets to mean

[1] Goldziher has recorded the views of the Ahl al-Ḥadīth in great detail. See Goldziher, *The Ẓāhirīs*, 6–19.

[2] Ibid. 13.

[3] The Shāfi'ite scholars appear to have a tradition of criticising Abū Ḥanīfah occasionally. For example, the leading Shāfi'ī scholar Imām al-Ḥaramayn al-Juwaynī while discussing a minor issue, attacks him, without apparent cause, by saying, "Did Abū Ḥanīfah have any hesitation in rendering an opinion on an issue of *fiqh*. If they say 'no,' we would say that such a man cannot be counted among the company of the learned." Al-Juwaynī, *al-Burhān* (Cairo, n.d.), ii, 1364. The editor of the book notes that such a statement about Abū Ḥanīfah hurts the Imām al-Ḥaramayn more than it does Abū Ḥanīfah.

that Abū Ḥanīfah was a "shrewd casuist and no legal jurist,"[4] he says: "While the schools of tradition directed their attention to existing and concrete facts, which they judged on the basis of concrete, existing, and historical legal data, the exponents of *ra'y* dwelt on casuistries that were void of any current interest."[5] This is a grave charge, and even the Shāfi'ite scholars did not assert this. In traditional Muslim circles, as a result of this propaganda, a bias against Abū Ḥanīfah and his school is found even to this day.[6]

The Ahl al-Ḥadīth were successful in their movement against the schools that employed *ra'y*. They came to dominate the scene, at least where legal theory was concerned. It was al-Shāfi'ī's legal theory that they accepted in the end, with some modification. The trend continued and there were many attempts to go even beyond the middle course taken by al-Shāfi'ī, in the adoption of literal rules. Examples of such literalist tendencies were reflected in the extinct Ẓāhirī school and, to some extent, in the surviving Ḥanbalī school. It was from these literalist tendencies that the *maqāṣid al-sharī'ah*, the purposes or the ultimate principles of the *sharī'ah*, appear to have emerged. The credit for this goes to the Shāfi'ite jurist-philosopher al-Ghazālī, and also to his teacher al-Juwaynī, the Imām al-Ḥaramayn.

The first task facing us is to study in more precise terms what we mean by *ra'y* and by "literalist interpretation." The earlier jurists have been accused of using *ra'y*, but what is *ra'y*? Modern scholars have called it "sound opinion,"[7] "individual opinion,"[8] "personal judgment,"[9] and "an inevitable postulate of the realities of practical legal affairs in the practice of judgeship."[10] It is also stated that *ra'y* was personal opinion in the beginning, but later came to be

[4]This, of course, is not his own conclusion, but what he thinks a statement of one of the propagandists means.

[5]Goldziher, *The Ẓāhirīs*, 16.

[6]There is an interesting story about such bias narrated by the publisher of the well-known Ḥanafite book by al-Kāsānī (d. 587) *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, 10 vols., Cairo (1968). A very old friend of this publisher, who was a scholar, visited him and asked him what he was planning to publish. When he learned that he was about to publish al-Kāsānī's book, the gentleman lost his temper and accused the publisher of being guilty of a grave offense. The publisher has related this story on the first page of the first volume.

[7]Schacht, *Introduction*, 26; Schacht, *Origins*, 98.

[8]Ahmad Hasan, *Analogical Reasoning*, 27.

[9]Goldziher, *The Ẓāhirīs*, 11.

[10]Ibid. 6. Whatever that means.

equated with analogy (*qiyās*).[11] If this was the case, then all the schools could be accused of using *ra'y*.[12] Why then the propaganda against the Ḥanafites?

All this, in fact, means nothing in legal terms, insofar as it does not indicate the methodology used by earlier jurists like Abū Ḥanīfah.[13] The term *ra'y* as used here is vague, and has no legal significance, that is, for a lawyer, terms like "sound opinion" or "personal judgment" have no meaning unless analyzed further. The meaning of *ra'y* can only be appreciated if we are able to compare the methodology of the Ahl al-Ra'y and that of the Ahl al-Ḥadīth, and to measure the impact of both methodologies on the development of law.

To accomplish this we should note a few basic facts about the nature of Islamic legal theory and the effect of the Shāfi'ite theory on the development of the law. It is only then that we can understand the methodology of the earlier jurists, and be able to assign an adequate meaning to the term *ra'y* of which the earlier jurists were accused. Finally, some features of the two methodologies should be compared. This will be accomplished in the next chapter when the theories of strict interpretation are described.

10.1.1. Approaches to legal theory

The discipline of *uṣūl al-fiqh* has been equated with "Islamic legal theory" on the analogy of modern (Western) law, because both answer questions about the nature of law, and explain how judges discover and apply this law. There is, however, an essential difference between the two. Western legal theory attempts to understand what judges actually do and then gives a reasonable explanation of the process, that is, it outlines a theory after an analysis of the judicial process.[14] *Uṣūl al-fiqh*, on the other hand, at least according to the generally accepted view in traditional Islamic law, governs the judicial process and determines beforehand the methodology that is to be employed by the jurist for the discovery of the law and its application to a

[11] Ibid. 11.

[12] This is what Ibn Ḥazm, the Ẓāhirī scholar did, because he rejected *qiyās*. Goldziher appears to be pointing out his view about the assumed similarity.

[13] Goldziher admitting this says that "There even prevails uncertainty concerning how Abū Ḥanīfah used the speculative components of legal education." Goldziher, *The Ẓāhirīs*, 12.

[14] Such an explanation is sometimes designated as a "theory of adjudication."

given set of facts. It, therefore, lays down a methodology that the judge and the jurist are obliged to follow. This is the reason why an understanding of legal theory, as a separate field of study, is not essential for the practice of law, but a thorough grounding in *uṣūl al-fiqh* is considered indispensable for the Muslim jurist and judge.

This has not been the position throughout Islamic legal history, that is, an understanding of legal theory in all its details with a predetermined methodology has not been a prerequisite for the practice of Islamic law in all ages. In fact, till the last decade of the second century of Islam, no legal theory was sytematically recorded.[15] This was a period when the law grew from the inner essential core into a highly consistent and mature legal system. This in no way indicates that the judges and jurists responsible for the development of Islamic law did not adopt a methodology for the discovery of the law. It simply means that no legal theory was expounded to understand and analyze this methodology, just as no legal theories were elaborated for the earlier periods of English common law, until the law had reached a level of maturity, and even then they fell within the domain of the legal philosopher rather than that of the practising lawyer or jurist.[16] Thus, the lack of an elaborate legal theory does not indicate the absence of a sound methodology. An attempt will be made, as we proceed, to show that there was a definite methodology that was followed more or less by all the judges and the jurists in the second century of the Hijrah.

It was with the appearance of the great Muslim jurist al-Shāfi'ī (150–204), the founder of the Shāfi'ite school of law, that the position was reversed. From now on a skill in legal theory was to be a prerequisite for every person aspiring to be a jurist, and it was legal theory that was to determine the methodology that such a jurist would employ. Al-Shāfi'ī began with the identification of the primary sources of Islamic law. As is generally believed, he was successful in securing a status for the *Sunnah* of the Prophet that was hitherto denied to it, it is claimed, by the earlier jurists. He laid down rules

[15]Some Ḥanafite jurists believing that a statement of legal theory is essential for the proper development of the law, insist that it was Abū Ḥanīfah who wrote the first book on *uṣūl al-fiqh*. Such a book is not available, nor is it ever referred to by later jurists for legal issues. The book known as *al-Fiqh al-Akbar* covers only a few pages and deals with the fundamental assumptions pertaining to the tenets of faith.

[16]John Austin's work can be considered to be the first systematic attempt to outline a theory for common law.

for the literal interpretation of the texts and for the extension of the rules in the texts by means of *qiyās* (analogy).[17] He rejected certain methods followed by the earlier jurists, like *istiḥsān* (which is usually the preference of a stronger concealed analogy over the obvious),[18] and modified others, like consensus of opinion (*ijmā'*).[19] He insisted that any rule of law derived by a jurists must be tied to a transmitted textual evidence (*dalīl*).[20] He also rejected the system of precedents, as will be shown later. Further, al-Shāfi'ī laid down strict conditions and qualifications for the person who could be considered qualified to interpret the law and to declare something permitted or prohibited.[21] He criticised the methods used by the earlier jurists, but instead of restricting his analysis to what the judges and jurists who had preceded him did, he proceeded to determine what the judges and jurists were required to do in future.

Al-Shāfi'ī's theory was not accepted all at once. Some of his ideas were modified, but it was his theory, in large measure, that appears to have been adopted after two centuries or more, at least by the Shāfi'ite jurists. This slightly modified version of al-Shāfi'ī's theory is what is today called the "classical legal theory" of Islamic law by those who claim that a common theory was adopted by all the later jurists and schools. Al-Shāfi'ī is considered to be the "champion of the *Sunnah*" and the true author of Islamic jurisprudence. He is deemed to be an outstanding genius of his times. Indeed he was, for he assessed what was going on in the judicial field in his age all over the Muslim world and was able to make proposals for what should be done.[22]

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[17] Al-Shāfi'ī, *al-Risālah*, 476. He devoted a separate section to analogy, but discusses this principle in different places in the book. See, e.g., page 39 where he makes a clear statement about the four sources of law. This he does within the topic of *istiḥsān* as well.

[18] Ibid. 507.

[19] Ibid. 471–76.

[20] Ibid. 39.

[21] Ibid. 39, 509–11; al-Shāfi'ī, *al-Umm*, vii, 274.

[22] After this text had been written Dr. Zafar Ishaq Ansari pointed out an article by Wael B. Hallaq, "Was al-Shāfi'ī the Master Architect of Islamic Jurisprudence," 25 *International Journal of Middle Eastern Studies* (1993), 587–605. In this arcticle, Hallaq brings up evidence to show that al-Shāfi'ī cannot be considered the founder of Islamic jurisprudence as is generally claimed, because much of the work attributed to him was actually done by jurists like al-Shāshī al-Qaffāl. He shows in this article that "Shāfi'ī's *Risāla* and the theory it embodied had very little, if any, effect during most of the 9th century; and that the image of

10.1.2. Developments in the law after al-Shāfi'ī

A true test, however, of any legal theory that proposes what should be done instead of analyzing what has been done is to measure how far it has led to the further development of the positive law. If the theory of law propounded by al-Shāfi'ī, or its modified version the so called "classical theory," was as effective as it is claimed to be,[23] then, its effect should be reflected in a rapid growth of the law. The results, however, may appear disappointing to some. Al-Shāfi'ī's theory did not lead to any growth in new areas of the law. It simply led to a slightly modified, and at times somewhat restricted, version of the law existing before his time. This should not be interpreted to mean that al-Shāfi'ī's theory was narrow or less effective. The truth is that al-Shāfi'ī's theory is designed with a different purpose in view. It is designed to meet the needs of the essential core of the law, the fixed part of the law described earlier, and not the flexible part that was now the domain of the ruler. Let us examine this development in a little more detail.

Muḥammad ibn al-Ḥasan al-Shaybanī (d. 189), the disciple of Abū Ḥanīfah, was the first jurist to have systematically laid down the entire corpus of the law, a little over one and a half century after the time of the Prophet.[24] His book *al-Mabsūṭ*, or *al-Aṣl* as it is called,

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Shāfi'ī as the founder of *uṣūl al-fiqh* was a later creation." [p. 588] He even tries to show that al-Shāfi'ī was not acknowledged as much of a traditionist by later scholars like Aḥmad ibn Ḥanbal and others. [p. 594]

[23]Such claims are usually made in the traditional Muslim circles and not in the West, where it is believed that Islamic legal theory and the positive doctrine have no relevance to each other. See section 2.2 in Chapter 2 for Schacht's statement quoted earlier or his book *Introduction*, 60.

[24]Some books of this great jurist are listed to give an idea of the work done at that early stage. The square brackets show different editions, probably pirated, of the the same edition. Muḥammad ibn al-Ḥasan al-Shaybānī (750 (ca.)-804 or 5), *Kitāb al-Aṣl*, Abū al-Wafā' al-Afghānī, Ed., 3 vols. (The complete work has not been published) (Ḥaydar Ābād al-Dakkan: Maṭba'at Majlis Dā'irat al-Ma'ārif al-'Uthmānīyah, 1966–); also (al-Qāhirah: Maṭba'at Jāmi'at al-Qāhirah, 1954) [also *Kitāb al-Aṣl al-Ma'rūf bi-al-Mabsūṭ* (Bayrūt: 'Ālam al-Kutub, 1990); also (Karachi: Idārat al-Qur'ān wa-al-'Ulūm al-Islāmiyah, [1987–])]; *Al-Aṣl: Kitāb al-Buyū' wa-al-Salam*, Chafik Chehata, Ed. (Cairo, 1954) (Part of *Kitāb al-Aṣl*); *Kitāb al-Siyar al-Kabīr* (1957) (Partly translated by Majid Khadduri, *Islamic Law of Nations: Shaybānī's Siyar* (Baltimore, 1966)); *Kitāb al-Ḥujjah 'alā Ahl al-Madīnah* (Ḥaydar Ābad al-Dakkan: Lajnat Iḥyā' al-Ma'ārif al-Nu'maniyah, 1965-) [also (Bayrūt: 'Ālam al-Kutub, 1983)]; *Kitāb al-Āthār* (Karachi: al-Majlis al-'Ilmī, 1965-); *Juz' min al-Amālī* (Ḥaydar Ābād, al-Dakkan: Maṭba'at Majlis Dā'irat al-Ma'ārif al-'Uthmānīyah, 1986); *Al-Jāmi' al-Kabīr* (Cairo, 1356)

would presumably exceed twelve sizable volumes if it is published in its entirety.[25] He compiled many other works too, and together these are known as the *Ẓāhir al-Riwāyah*. In his works, al-Shaybānī recorded not only the opinions of Abū Ḥanīfah and Abū Yūsuf, but also those of other jurists, like Ibn Abī Laylā, Zufar, Ḥasan ibn Ziyād, al-Thawrī, al-Awzā'ī, and Ibrāhīm al-Nakha'ī. His works show that the Islamic legal system was fully developed in all its branches at that time, even in the areas of international law and *ḥiyal*. In addition to this, Abū Yūsuf compiled his book on revenue, the *Kitāb al-Kharāj*, especially for the ruler. In these works there are many things that are later given up by the jurists. After the Ḥanafīs, no school discusses in detail the problems of international law (*siyar*) or even matters of revenue (*kharāj*);. The latter now being undertaken as minor sections within the chapters on spoils or *zakāh*. The reason is obvious. These areas are now the domain of the ruler, a part of the flexible sphere of the law, they will change with change in the times.

In the Mālikite school the first book was Mālik's *al-Muwaṭṭa'*, which is also considered to be the first book of Islamic law. This was followed by Saḥnūn's *al-Mudawwanah al-Kubrā*, which appears to have been compiled shortly after al-Shāfi'ī's death, and is written in response to the verdicts issued by the jurists of Iraq, the Ḥanafites and others. It contains verdicts issued in accordance with Mālik's principles by Ibn al-Qāsim as recorded by Saḥnūn. This book, compiled after al-Shāfi'ī's death, does not take into account the new theory propounded by al-Shāfi'ī or his views on the law. It appears to be a mixture of the matters falling under the fixed as well as the flexible spheres of the law.

[also (Bayrūt: Iḥyā' al-Turāth al-'Arabī, 1979); also (Lahore: Dār al-Ma'ārif al-Nu'mānīyah, 1981)]; *al-Jāmi' al-Ṣaghīr* (Haydar Ābād, n.d.) [also (Karachi: Idārat al-Qur'ān wa-al-'Ulūm al-Islāmīyah, 1987)]; *Kitāb al-Makhārij fī al-Ḥiyal*, J. Schacht, Ed. (Leipzig, 1930) [*Das Kitāb al-Maḥāriǧ fil-Ḥijal des Muḥammad ibn al-Ḥasan aš-Šaibānī* (Hildesheim, G. Olms, 1968)]; *Kitāb al-Ziyādāt* (Haydar Ābād, n.d.); *al-Iktisāb fī al-Rizq al-Mustaṭāb* (Dimashq: 'Abd al-Hādī Ḥarṣūnī, 1980) [also (Bayrūt: Dār al-Kutub al-'Ilmīyah, 1986)]; *al-Kasb* (Dimashq: 'Abd al-Hādī Ḥarṣūnī, 1980).

[25] Only the first three volumes of this book have been published, as a result of the remarkable efforts of Abū al-Wafā' al-Afghānī. The section on sales was edited by Chafik Chehata. The remaining exists in manuscript form and needs to be published. It is to be hoped that an Islamic country like Pakistan, where most of the people follow the Ḥanafī school, would take interest in the publication of the entire book. The complete manuscripts are available in Cairo. There is also a need to honor and acknowledge the work done by Abū al-Wafā' al-Afghānī.

This shows that the law had been fully developed by the time of Mālik and Abū Ḥanīfah. A cursory examination of the Ḥanafite and Mālikite works shows that the law was considerably developed, and there is very little difference, except in details, between the law as it existed then and what we find in later books today. Most of the later works are commentaries on that earlier law. Even Joseph Schacht noticed this stage in the development of the law. The state of the law much before al-Shāfi'ī's time, and even before al-Shaybānī's work, led Schacht to conclude: "When the Umayyads were overthrown by the 'Abbāsids in 132 of the hijrah (A.D. 750), Islamic law as we know it had acquired its essential features; the need of the Arab Muslim society for a new legal system had been filled."[26] It appears that he draws this conclusion because by this time Abū Ḥanīfah and Mālik, as well as other well-known jurists had completed their work.

What, then, was the purpose behind the new theory propounded by al-Shāfi'ī? Al-Shāfi'ī was a remarkable man with tremendous skills. He appears to have seen clearly all the developments that had occurred before him. It also appears that he saw clearly that the state was now making laws in certain areas and assigning it to functionaries other than the *qāḍīs*. Realizing his duty to the essential core of Islamic law, which was derived directly from the texts, he designed a theory that was to meet the needs of this inner legal core, and would ensure its purity by tying it in with its sources. This could only be achieved with a strict theory that would exclude anything that fell within the domain of the state and not within the immediate domain of the Muslim jurist. His work, therefore, does not concern itself with questions of international law, nor with questions of *kharāj* (revenue), which are two clear examples of matters that fall within the flexible sphere, the domain of the ruler.

The first book of law in the Shāfi'ī school is attributed to al-Shāfi'ī himself.[27] This was the *Kitāb al-Umm*. It deals at length with the *'ibādāt* (the ritual law) and even with the criminal law, but ignores several areas of the law of obligations. It was followed, fifty years later, by a summary of this book and some additional details by al-Muzanī.[28] Though the names of some early Shāfi'ite jurists

[26] Schacht, *Introduction*, 49.

[27] It is vehemently argued by Zakī Mubārak that this book was not written by al-Shāfi'ī, but by al-Buwaytī. This theory has not been taken seriously by other scholars. See the discussion of the issue by the editor of *al-Risālah*, 9-10.

[28] Abū Ibrāhīm Ismā'īl ibn Yaḥyā al-Muzanī (264/878), *Mukhtaṣar*. It is printed

are mentioned in the books of *ṭabaqāt*[29] and occasional references to them are made in the works of later Shāfi'ite jurists,[30] the first book of any consequence was written by al-Shīrāzī (d. 476)[31] two and one-half centuries after al-Shāfi'ī's death. A little before this al-Māwardī (d. 450) wrote his famous book *al-Aḥkām al-Sulṭāniyah*,[32] and another on the duties of the *qāḍī*, but Shāfi'ite law was not foremost in his mind, and these are books of a different nature.[33] This period is followed by a large number of works not only on Shāfi'ite law, but also on Shāfi'ite legal theory. The law derived on the basis of al-Shāfi'ī's theory appears to have matured by this time and coincides with the maturity of his legal theory.[34]

Because al-Shāfi'ī's theory was concerned with the fixed part of the law, some areas of the law that are dealt with by other schools were scarcely touched upon by al-Shāfi'ī. Thus, in several cases, Shāfi'ite law may even appear to be highly restrictive, as compared to the law that had existed before him. The reason is that Shāfi'ite legal theory was much more strict than the methodology adopted by the earlier jurists, as it was meant to deal with the fixed part of the law alone. Take the case of the law of partnership (*sharikah*). There is an elaborate structure of partnerships in the Ḥanafite system, and there are several forms in Mālikite law, but al-Shāfi'ī does not allow any of these forms. The only form of partnership that he allows is co-ownership,[35] and this exists among human beings anyway, by

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on the margin of al-Shāfi'ī (204/802), *al-Umm*, 7 vols. in 4 (Cairo, 1388/1968).

[29]See, e.g., Abū Isḥāq Ibrāhīm ibn 'Alī al-Shīrāzī (1003 (ca.)–1083) *Ṭabaqāt al-Fuqahā'* (Cairo, 1937.)

[30]Such references are to be found, for example, in the work of al-Juwaynī, *al-Burhān*, *passim*.

[31]Al-Shīrāzī, *al-Muhadhdhab fī Fiqh Madhhab al-Imām al-Shāfi'ī*, 2 vols. (Cairo, n.d.); *Kitāb al-Tanbīh fī al-Fiqh* (Cairo, 1348).

[32]Al-Māwardī, *al-Aḥkām al-Sulṭāniyah* (Cairo, 1973).

[33]As compared to this there is a constant stream of Ḥanafite manuals of law during the period following al-Shāfi'ī's death. This is not to say that al-Shāfi'ī did not have any followers during this period or did not have any influence at all. The influence of al-Shāfi'ī's thought is indeed felt in the Ḥanafite works around the middle of the fourth century, for example in the writings of al-Dabūsī, al-Ṭaḥāwī, and al-Jaṣṣās (370), and it appears that he had a sizable following by this time. The point is that these followers do not appear to have influenced the further development of the law.

[34]In fact, the first systematic exposition of Shāfi'ite law was made by al-Nawawī.

[35]See Abraham L. Udovitch, *Profit and Partnership in Medieval Islam* (Princeton, 1976); 'Alī al-Khafīf, *al-Sharikāt fī al-Fiqh al-Islāmī* (Cairo, n.d.).

necessity. Even the name "partnership" is not applied to this form of ownership in modern law, and it is referred to as co-ownership. He also does not allow general agency (*wakālah 'āmmah*), which is permitted by other schools.

In order to ensure that the fixed part of the law would develop in the proper way, al-Shāfi'ī laid down strict conditions for those who would be interpreting the law for this part. These are listed in his book *al-Risālah*.[36] Schacht felt that this could be one reason for the stagnation and *taqlīd* that set in after al-Shāfi'ī's time, because the first theoretical indications of this were noticeable in al-Shāfi'ī himself.[37] Such a view is based on a misreading of the true function of al-Shāfi'ī's theory. The conditions were laid down for those who would be dealing with the fixed part of the law, not for those who would be occupied with the flexible sphere, where obviously the conditions would be somewhat relaxed.

During the period that Shāfi'ite law was moving toward maturity, the Ḥanafite jurists appear to be assessing what the earlier jurists of their school had done, that is, what methodology they had used to develop the law. Their method of studying legal theory resembles what is done in the West today, insofar as it is an assessment of what the judges had done and not what the judge should be doing. Jurists like al-Karkhī,[38] al-Khaṣṣāf,[39] al-Dabūsī,[40] al-Ṭaḥāwī,[41] al-Jaṣṣāṣ,[42]

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[36] Al-Shāfi'ī, *al-Risālah*, 39, 509–11; *al-Umm*, vii, 274.

[37] Schacht, *Introduction*, 70.

[38] 'Abd Allah ibn al-Ḥusayn al-Karkhī (340/935), *Risālah fī al-Uṣūl*, on pp. 78–87 following al-Dabūsī (430/1039), *Ta'sīs al-Naẓar* (Cairo, n.d.); see also *al-Uṣūl allatī 'alayhā Madār Furū' al-Ḥanafiyah*, with comments by Abū Ḥafṣ al-Nasafī (Cairo: al-Maṭba'at al-Adabiyah, n.d.).

[39] Abū Bakr Aḥmad ibn 'Umar al-Shaybānī al-Khaṣṣāf (797–875), *Kitāb Aḥkām al-Awqāf* (Cairo, 1322/1904); *Kitāb Adab al-Qāḍī* (Cairo: Qism al-Nashr bi al-Jāmi'ah al-Amrikiyah, 1978); *Kitāb al-Nafaqāt* (Bayrūt: Dār al-Kitāb al-'Arabī, 1984.)

[40] Al-Dabūsī (430/1039) *Ta'sīs al-Naẓar*, (Cairo, n.d.)

[41] Abū Ja'far Aḥmad ibn Muḥammad ibn Salāmah al-Ḥajrī Al-Ṭaḥāwī (852–933), *Al-Mukhtaṣar [fī al-Fiqh]* (Cairo, 1370); *Kitāb Mushkil al-Āthār*, 4 vols. (Ḥaydar Ābād, 1333); *Kitāb al-Shurūṭ al-Kabīr* (Baghdād, 19-?); also *Das Kitāb Aś-Śufā aus dem al-Ğāmi' al-Kabīr fiś-Śurut des Abū Ğa'far Aḥmad ibn Muḥammad Aṭ-Ṭaḥāwī* (Heidelberg: C. Winter, 1930.); see also Jeanne Watkin, *Function of Documents in Islamic Law*, (Albany, 1972); *Das Kitāb Adkār al-Ḥuqūq war-Ruhūn aus dem al-Ğāmi' al-Kabīr fiś-Śurūt des Abū Ğa'far Aḥmad ibn Muḥammad aṭ-Ṭaḥāwī* (Heidelberg, C. Winter, 1927); *Sharḥ Ma'ānī al-Āthār*, 4 vols. in 2 (Cairo, 1386); *Ikhtilāf al-Fuqahā'* (Islamabad, 1971).

[42] Abū Bakr Aḥmad ibn 'Alī Al-Jaṣṣāṣ al-Rāzī (370/981) *Aḥkām al-Qur'ān*, 2

al-Samarqandī,[43] and al-Sarakhsī carried out this process.[44] There were others too, but their works are not available. By the time of al-Sarakhsī (d. 496), any question about the nature of Ḥanafite legal theory could be answered very easily. In addition to this, the Ḥanafite jurists during this period were busy weeding out any inconsistencies that had remained in their law, and again by the time of al-Sarakhsī, as can be observed in his works, the law achieved a highly consistent form. The significant point here is that even the jurists of the Ḥanafī and Mālikī schools were now occupied with the fixed part of the law, unlike their predecessors. Because of this they fashioned their legal theories in a way that conformed, at least in outward form, with the pattern established by al-Shāfi'ī. This has led some to conclude that it is all one theory. Underneath the outward form, the theories of the Ḥanafīs as well as the Mālikīs retain their individuality, especially the theory of the Ḥanafīs.

Surprisingly, the time of the maturity of Shāfi'ite law and legal theory coincides with the time of the full exposition of Ḥanafite legal theory, is followed immediately by the time of al-Ghazālī and the emergence of the views about the purposes of the law. A hazy, yet recognizable, picture appears to emerge. The initial period of the development of the law and its maturity in the first one and a half century appears to be dealing with all branches of the law, whether they belonged to the fixed part or to the flexible part of the law. There appears to be no distinction between the domain of the jurist and that of the ruler (*imām*). Many of the jurists of this period were *qāḍīs* concerned with the administration of justice as well as with the teaching and development of the law. This period is followed by the recording of this law in the shape of manuals by the Ḥanafites and the Mālikites. This is followed by al-Shāfi'ī's assessment of the earlier methodology and the exposition of a new theory of interpretation

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vols. (Istānbūl: Maṭba'at al-Awkāf al-Islāmīyah, 1355/1916); *Sharḥ Kitāb Adab al-Qāḍī* (Commentary on al-Khaṣṣāf's work above) Farhat Ziadeh, ed. (Cairo, 1978). An introduction to his *Aḥkām al-Qur'ān* is *Uṣūl al-Jaṣṣāṣ*. Excerpts of this book have been published from Lahore under the same title.

[43] Abū al-Layth Naṣr ibn Muḥammad ibn Aḥmad ibn Ibrāhīm al-Samarqandī, *Fatāwa al-Nawāzil* (Ḥaydar Ābād, 1335); *Khizānat al-Fiqh wa 'Uyūn al-Masā'il*, 2 vols. (Baghdād, 1385/1965).

[44] Muḥammad ibn Aḥmad al-Sarakhsī (409/1097) *Kitāb al-Mabsūṭ*, 30 vols. (Cairo: Maṭba'at al-Sa'ādah, 1324–31/1906-13]); *Sharḥ Kitāb al-Siyar al-Kabīr* (Commentary with al-Shaybānī, *Kitāb al-Siyar al-Kabīr*) (Cairo, 1916 & 1957); *al-Nukat* (Ḥaydar Ābād al-Dakkan: Lajnat Iḥyā' al-Ma'ārif al-Nu'mānīyah, 1967).

meant for the fixed sphere of the law. The new theory of interpretation is followed by the development of Shāfi'ite law, which reaches maturity over a period of two centuries. A parallel development is the exposition of Ḥanafite legal theory based on the decisions and practices of the earlier jurists of this school. This is followed by a new theory proposed by al-Ghazālī. However, we have yet to see whether this was a new theory or a restatement of earlier ideas.

The main conclusion that we may draw from this, among others, is that the Ḥanafī law grew in a period that we may consider an era when the fixed and flexible parts of the law, as described in the previous part of this book, grew together. It appears that it was during the time of the Mālik and Abū Ḥanīfah, or the time of the advent of the 'Abbasides, that the domain of the jurist and that of the state was identified clearly, though some signs of this may be noted much earlier. Henceforth, the jurist would be occupied with the exposition of the fixed part of the law and the ruler would concern himself with the flexible part of the law.

Although, al-Shāfi'ī formulated his theory at the end of the second century, the law expounded by him did not acquire a systematic form till the fourth century or its end; that is, it became an influential law around this time. Al-Shāfi'ī's legal theory, however, did not bring about any structural changes in the law. The influential law during most of the Umayyad period as well as the 'Abbaside period was the Ḥanafite law. This law is said to be based on a methodology that was dominated by *ra'y*. We may now examine the meaning of this term within the overall methodology of the Ḥanafī school.

10.2. The earlier jurists and their methodology

What was the methodology of Abū Ḥanīfah and his times? How did the jurists interpret the law, and how did they use the sources? There is very little that has been said in modern legal literature about this. In fact, literature on this methodology is almost non-existent. The major source that can provide us with information has not even been published in full. This is the book of Muḥammad al-Shaybānī, the disciple of Abū Ḥanīfah, known as *al-Mabsūṭ* or as *al-Aṣl*. Only a few volumes of this indispensable work have been published so far. However, we do not have to delve too deep to discover the methods used. Further, there are other works by this jurist that have been published.

Schacht used some phrases, like "Umayyad practice" and "living tradition," to describe the materials used by the earlier jurists. Such phrases were used more in relation to the *Sunnah* of the Prophet rather than the methodology of the earlier jurists.[45] It may be mentioned here that the great debate about the wholesale fabrication of the traditions that ensued ever since Joseph Schacht put forward his claim is not relevant to the present study, except indirectly.

It may, however, be mentioned that as compared to Schacht, a more reasonable view was adopted by Noel J. Coulson: "It is a reasonable principle of historical enquiry that an alleged ruling of the Prophet should be tentatively accepted as such unless some reason can be adduced as to why it should be regarded as fictitious."[46] In other words, the benefit of doubt is to be given to a tradition until sufficient proof is available to pronounce the verdict "guilty." This appears to be what the Muslim jurists and the traditionists did. They were aware of the fabrication of traditions, and they had their own tests and criteria for establishing their authenticity. Once a tradition met the basic conditions they had no choice but to accept it. A tradition once accepted became part of the legal system, if it was relevant to the law, and what remained to be scrutinized was how the jurists handled this tradition, along with other legal materials, to discover the law and decide disputes.

For the present study, therefore, what is relevant is how the earlier jurists employed the traditions accepted by them, along with other legal materials. As the emphasis here is on the methodology of these jurists, it does not matter how a tradition was incorporated into the *Sunnah*, or whether it was based on "Umayyad practice"—whatever that means—or on something else. Once accepted and declared valid this tradition became part of the Islamic legal system and our aim is to understand how it was used after acceptance. The procedure of acceptance or the debate about the sources is more or less irrelevant. If the purpose is to understand how the principles of English law, for example, are used and applied by the judges, it really should not matter whether a principle was originally used by the Saxons or Normans. The source of the principle would be of remote historical interest, and would in no way explain the methodology of the later English judges.

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[45] See generally Schacht, *Origins of Muhammadan Jurisprudence* (New York, 1940).

[46] Coulson, *A History of Islamic Law*, 65.

On some occasions, Schacht uses the phrase "superior technical reasoning,"[47] when he wishes to point out the superiority of the reasoning employed by al-Shāfi'ī. It is not very clear what he means by this phrase, especially when he does not elaborate what superior technical reasoning stands for and what these technical assumptions are on which such a view is based. Does he prefer one type of reasoning over the other because of criteria based on the science of logic, or on the criteria laid down by the traditionists, or on those determined by modern law, or on criteria fixed by al-Shāfi'ī, or on those determined by Schacht himself? None of the criteria, except the last, would be relevant for such a comparison, and Schacht does not explain the meaning of this phrase. One does get the feeling, however, while studying his works, that he is judging the earlier jurists on the basis of rules laid down by al-Shāfi'ī, and that he sees many things through al-Shāfi'ī's eyes.[48] It is the same method used before him by Goldziher, who judged Abū Ḥanīfah's method through the eyes of the Ahl al-Ḥadīth. If this is the case, it would not be fair to those earlier jurists who had made assumptions that were somewhat different from those made by al-Shāfi'ī, as will be explained in the following pages.

We may begin the examination of the earlier methodologies by noting that one of the major characteristics of Islamic law is the use of the analogical method to develop the law. Schacht says that according to the sociology of law "there are two methods by which legal subject-matter is brought into a system, the analytical and the analogical method. Islamic law represents this latter type of systematizing in great purity."[49] He stated earlier that "[Systematic reasoning] started with the exercise of personal opinion on the part of the earliest cadis and lawyers."[50] It is not clear what kind of "systematic reasoning" can be based on "personal opinion," and what is meant by "personal opinion" in legal terms. Further, is the "analogical method" the same thing as "personal opinion"? These terms need to be understood more precisely before a judgment can

[47] See Schacht, *Origins*, *passim*.

[48] This may be judged from his statement about the method of the earlier judges described by al-Kindī: "It is likely that some of the decisions which are attributed to those *kādīs*, and which are irregular by later standards." Schacht, *Introduction*, 25. It is obvious that by later standards he means standards determined by al-Shāfi'ī.

[49] Ibid. 208.

[50] Schacht, *Origins*, 98.

be passed. The assertion about the "analogical method" appears to be true about the post-Shāfi'ī period, but must be qualified for the pre-Shāfi'ī period. Further, the two methods, the "analytical" and the "analogical," are not mutually exclusive as Schacht appears to suggest. An explanation of the analytical method will help clarify the methodology of the pre-Shafi'ī period.

Roscoe Pound says that the analytical method is nothing more than "a logical plan which will explain as much as possible of the actual [legal] material"[51] and indicate "the remainder for logical inconsistency therewith."[52] The idea of law according to the analytical jurist[53] contains three elements: a precept element, a technique element, and an ideological element. By precept four things are implied: rules, principles, standards, and conceptions. A rule is a legal precept attaching definite detailed legal consequences to a definite detailed set of facts. This is the earliest type of precept and the books of the *fuqahā'*, we may add, are full of them. A conception is a legally defined category into which cases may be fitted in order to facilitate the application of a series of rules and principles, for example, sale, bailments, trusts, and so on. A standard is a measure of conduct prescribed by law from which one departs at one's own peril. The standard of due care is an example. A principle, on the other hand, is an authoritative starting point for legal reasoning from which we seek grounds of decision by deduction. Principles are the work of lawyers. They organize experience of interpreting and applying the rules. In modern law, principles are said to come into operation in "hard cases." This has been explained in great detail by Ronald Dworkin.[54] Hart has called such an application as the "open texture of the law."[55] Melvin A. Eisenberg, in his outstanding book *The Nature of the Common Law*, explains the nature of principles as follows:

> In the context of adjudicative reasoning, the term *principle* is sometimes used to mean a moral standard and sometimes used to mean a legal standard. Often it is unclear whether the term is being used in the first or in the second sense.

[51] Pound, i, 73.

[52] Ibid. 73.

[53] See Pound, ii, 3-18.

[54] R. Dworkin, "Hard Cases," *Harvard Law Review* 8 (1975), 1057.

[55] H.L.A. Hart, *The Concept of Law*, 132.

> ... Principles in the first sense—moral standards—figure in adjudicative reasoning but are not themselves law. Principles in the second sense—legal standards—are by hypothesis law. It is true that some standards are principles in both senses. An example is the standard that no person should unjustly enrich himself at another's expense.[56] ....
>
> ... When principles and rules are conceived in this way, principles may seem as explanations for rules, in the sense that we commonly invoke general propositions to explain those that are more specific. However, the force of principles is not merely explanatory. Principles, like rules, are binding legal standards, and often determine results without the mediation of rules.[57]

Within this logical plan the analytical jurist incorporates his materials.

There can be no doubt that rules and conceptions were found at a very early stage in Islamic law. As for standards, they had started appearing, though they had not been refined. Schacht recognizes "fairness," to give one example.[58] The most important precepts are principles, and the methodology of the earlier jurists rests on the principles of Islamic law. This by no means implies that the principles used by the earlier Muslim jurists were as flexible as the principles that may be operating in the modern English common law, for example. These were general principles derived from the Qur'ān or from the *Sunnah* of the Prophet. Some of these appear to be derived principles, and are similar to maxims, but they should not be equated with many of the maxims that are to be found in books titled *al-Ashbāh wa al-Naẓā'ir*, about which an explanation will be provided in a later chapter.

The principles used by the Ḥanafites, on the other hand, appear to be structured on their definition of the general word (*'āmm*). Thus, if the command or prohibition in the text is mentioned in general terms, the *ḥukm* or rule contained in such a text would apply to all the categories that could possibly be covered by this general term. This is how a *qā'idah kullīyah* is constructed in Islamic law, according to the Ḥanafites. A clear exposition of this is provided by the Mālikī

[56] *Cf.* the verse of the Qur'ān: "And eat not up your wealth among yourselves unjustly" Qur'ān 2 : 188 as well as the provisions about *ribā*.

[57] Melvin A. Eisenberg, *The Nature of the Common Law* (Harvard, 1988), 76–77.

[58] Schacht, *Introduction*, 204.

jurist al-Qārāfi.[59] The significant point about such a principle, once established, is that its implication is definitive (*qaṭ'ī*), which means that it cannot be restricted by an evidence that has a weaker implication, that is, which is probable (*ẓannī*). The strength of an evidence is measured in two ways: through the strength of its transmission and through the strength of the implication of the text. Thus, if a verse of the Qur'ān bearing a *ḥukm* is expressed in general terms, it is definitive from both aspects. The Qur'ān is transmitted by way of *tawātur* and is, therefore, definitive from the aspect of transmission. It is also definitive because of the general terms in which it has been expressed. A *khabar wāḥid* (individual narration) is always probable in the Ḥanafite system. In other words, even if the individual narration is expressed in specific terms, and is definitive from this aspect, it can never be strong enough to restrict the general word of the Qur'ān, because the *khabar wāḥid* is always *ẓannī* (probable) from this aspect.[60] The use of general principles for the derivation of the law by the Ḥanafites and the other jurists may be explained with the help of a few examples.

The difficulty about the early Ḥanafī texts is that they merely list cases that may be gathered under one principle or a series of principles. For someone not acquainted with the principles that underlie the stated cases, these texts become extremely difficult to understand, without the help of a commentary. It is only sometimes that a principle may be completely or partially stated in the text. We may begin with one such text borrowed from the "Book of Sales and *Salam*," which is a section of al-Shaybānī's *Kitāb al-Aṣl*. For the explanation of this example reliance is placed on al-Sarakhsī's *al-Mabsūṭ*. The issue relates to the meaning and principles of *ribā*. It is also instructive in other ways, as many modern scholars keep on groping in the wilderness for the meaning of *ribā*, when all they need to do is to understand the principles related to it.

Shaybānī begins the "Book of Sales and *Salam*" with a narration from the Prophet:

> Aḥmad ibn Ḥafṣ said: Muhammad ibn al-Ḥasan related to us and said, "Abū Ḥanīfah related to us from 'Aṭīyah ibn al-'Awfī from Abū Sa'īd al-Khudrī from the Messenger of Allāh, may

[59] See the introductory part of al-Qarāfī, *Sharḥ Tanqīḥ al-Fuṣūl* (Būlāq, n.d.)

[60] To be sure, the rule varies depending on whether the subject-matter relates to the *'ibādāt* or to the *mu'āmalāt*.

> Allāh's peace and blessings be upon him, who said, 'Gold for gold, like for like, from hand to hand, and the excess is *ribā*; silver for silver, like for like, from hand to hand, and the excess is *ribā*; wheat for wheat, like for like, from hand to hand, and the excess is *ribā*; dates for dates, like for like, from hand to hand, and the excess is *ribā*; salt for salt, like for like, from hand to hand, and the excess is *ribā*."[61]

To this he appends a narration from Ibrāhīm al-Nakha'ī:

> Muḥammad from Abū Ḥanīfah from Ḥammād from Ibrāhīm, who said: Exchange (make an advance payment with) what is measured for what is weighed, and an advance payment with what is weighed for what is measured, but do not make an advance payment with what is weighed for what is weighed nor with what is measured for what is measured. If the species are different in what is not measured or weighed then there is no harm in (exchanging) it, two for one, from hand to hand, and there is no harm in it (even) with a delay....[62]

In this text first the principles, that are both moral and legal, are stated by narrating the tradition from the Prophet. This is followed by the statement of the precedent from Ibrāhīm al-Nakha'ī upheld by Ḥammād and then upheld by Abū Ḥanīfah. After stating the precedent and the principles maintained in them, al-Shaybānī goes on

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[61] Al-Shaybānī, *Kitāb al-Buyū'*, 1:

أحمد بن حفص قال : أخبرنا محمّد بن الحسن قال : حدثنا أبو حنيفة عن عطية العوفى عن أبى سعيد الخدرى عن رسول الله صلى الله عليه وسلم أنّه قال : « الذّهب بالذّهب مثلا بمثل يدا بيد والفضل ربا ، والفضّة بالفضّة مثلا بمثل يدا بيد والفضل ربا ، الحنطة بالحنطة مثلا بمثل يدا بيد والفضل ربا ، والتمر بالتمر مثلا بمثل يدا بيد والفضل ربا ، والملح بالملح مثلا بمثل يدا بيد والفضل ربا ».

[62] Ibid. 2:

محمّد عن أبى حنيفة عن حمّاد عن ابراهيم أنّه قال : وأسلم ما يكال فيما يوزن وأسلم ما يوزن فيما يكال ولا تسلم ما يوزن فيما يوزن ولا ما يكال فيما يكال . واذا اختلف النوعان فيما لا يكال ولا يوزن فلا بأس به اثنان بواحد يد بيد ولا بأس به نسيئة .

to list case after case of sale and *salam*, along with the decisions of the jurists when they differ. As the purpose here is not to understand the cases but the use of principles, the detailed cases are being ignored.

There is a principle in the Qur'ān that has not been mentioned by al-Shaybānī here, apparently on the assumption that the reader is well aware of it. This principle is contained in the verse of the Qur'ān: "They say: *bay'* (sale) is the same as *ribā*; but Allāh has permitted sale and prohibited *ribā*."[63] Stated generally, the principle means: ALL KINDS OF SALE ARE PERMITTED, EXCEPT THOSE BEARING RIBĀ.

We know what sale is, but what is *ribā*? The word *ribā* in the Qur'ān is treated by the jurists as *mujmal* (unelaborated).[64] A *mujmal* word is in need of *bayān* (elaboration), and the first place this elaboration is to be sought is in the *Sunnah* of the Prophet. It is only when there is no explanation in the *Sunnah* that the jurist may turn to an explanation based on the practices prevailing during the Prophet's time, or to the literal meanings of the term in those days. In the case of *ribā* the tradition stated comes in and provides a series of rules, and along with a few other principles (not reproduced here) it governs a major part of the contract of sale in Islamic law. If, however, we take a segment from the tradition and try to understand it, it appears very ordinary if not meaningless. For example, take the sentence, "Gold for gold, like for like, from hand to hand, and the excess is *ribā*." Now, why on earth should two persons bring equal quantities (like for like) of gold to the market place, exchange them on the spot (hand to hand) and return home? This, however, is not what the principle requires. On the other hand, it means: DO NOT EXCHANGE GOLD FOR GOLD, UNLESS IT IS EQUAL IN WEIGHT AND IS EXCHANGED AT ONCE WITHOUT A DELAY, FOR OTHERWISE THE EXCESS WOULD AMOUNT TO RIBĀ. In other words, this tradition is not advocating a peculiar form of barter, but is stating a principle.

The result of this principle is that one person cannot give to another person ten pieces of gold, say, and take back eleven pieces of gold (not like for like) after a year (not hand to hand), because the extra piece would amount to *ribā*. This is clearly a transaction

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[63] Qur'ān 2 : 275

[64] Al-Jaṣṣās says: "It [*ribā*] became like the rest of the obscure (*mujmal*) nouns that are in need of an elaboration (*bayān*). These are nouns that have been transferred from the language to the law for meanings to which they were not applied in the language. . . . The Prophet (God's peace and blessings be upon him) provided extensive elaboration of the meaning intended by Allāh in the verse by way of explicit commands and as precedents.Al-Jaṣṣās, *Aḥkām al-Qur'ān*, i, 464–65.

of charging interest from another person and is prohibited in Islamic law.

This, however, is not all that is prohibited by the Ḥanafite jurists, who strive to achieve analytical consistency in the operation of these principles. They read part of the principle, DO NOT EXCHANGE GOLD FOR GOLD, UNLESS IT IS EQUAL IN WEIGHT AND IS EXCHANGED AT ONCE WITHOUT A DELAY, and maintain that a person paying ten pieces of gold to another person and taking them back after a year is also indulging in *ribā*, as the beneficiary is going to utilize the benefits of these ten pieces for a year, which is an excess and, therefore, *ribā*. This may appear strange at first, because the transaction contemplated in this second case is nothing more than an interest-free loan, which is not only permissible in Islam but encouraged too. That is exactly what the jurists intend by this prohibition. They want to relate the case of the loan (*qarḍ*) to this principle by saying that its exemption comes from the Qur'ān and the person making it is consciously gifting away the benefits of the ten pieces of gold, which would have amounted to *ribā* in the absence of a conscious donation to the recipient for a period of one year. The conscious donation of the benefits releases the hold of the prohibiting principle. This is the reason why such a loan has been called *qarḍ ḥasan* (a gracious loan). This is what is meant by checking "the remainder for logical inconsistency therewith."[65] The general prohibition of exchanging equal quantities of wealth with a delay stands restricted in the case of the *qarḍ ḥasan*.

What does this tell us about the methodology of the Ḥanafī jurists? It shows that they read the legal texts, and instead of looking for literal meanings first, they tried to discover or to formulate general principles that would govern a majority of cases. After determining a broad principle, they would look for sub-principles, if these were available. If there were exceptions or provisos to these principles, they would list them for the sake of analytical consistency, even when they did not pertain to the case under examination. In this particular case, the broad initial principle is:

> All sales are permitted except those bearing *ribā*.

This principle is derived from the verse of the Qur'ān. After this, they derive sub-principles from the *Sunnah*. These sub-principles explain the meaning of the term *ribā* mentioned in the Qur'ān. We have considered only two of these sub-principles. The first of these is:

[65] Pound, i, 73.

> *Do not sell 10 pieces of gold for 11 pieces of gold with a delay, because the excess is ribā.* If at all you wish to exchange gold for gold, then, exchange 10 pieces of gold for 10 (not 11) identical pieces, and this exchange is to be from hand to hand (that is, spot).

This sub-principle prohibits what we call interest. It leads, however, to the second sub-principle, which says:

> Do not exchange 10 pieces of gold for 10 identical pieces of gold with a delay, because the benefits to be derived during the period of delay amount to *ribā*. If at all you have to exchange 10 pieces of gold for 10 identical pieces of gold, you must do so at once, without delay.

This principle prohibits the granting of a loan or *qarḍ* without interest. In other words, this principle refuses to recognize a loan as a valid transaction, unless the lender declares openly that it is a *qarḍ ḥasan*, that is, a gracious loan in which there is a conscious gifting of the benefits by the lender. The reason is that the benefits passed on to the borrower for the period of delay amount to an excess (*faḍl*) or *ribā*. The only way this would be legalized is if the lender makes a gift of these benefits to the borrower. Here we may ask: What is the difference between an interest-free loan and a *qarḍ ḥasan*? The answer is that in a *qarḍ ḥasan* all the conditions imposed for a *qarḍ ḥasan* will apply, and not those imposed by the money-lender. For example, one condition is that you cannot fix a period of delay; it has to be left open. This is how analytical consistency is maintained by relating all principles and exceptions.

A few examples showing the clash of general principles with traditions will be helpful in further understanding the methodology of the earlier jurists.

A well-known case in Islamic law is that of dogs, cats, and beasts of prey licking a water-utensil. The tradition about the dog is related from Abū Hurayrah, and is considered authentic by the jurists. The Prophet is reported to have said: "If a dog licks a utensil belonging to one of you, he should purify it by washing it seven times." In some versions it is said, "The first time with dust," and in others, "Cover it the eighth time with dust."[66] The tradition about cats is

[66] Ibn Rushd, *Bidāyat al-Mujtahid*, i, 21–22.

related by Qurrah from Ibn Sīrīn from Abū Hurayrah, who said, "The Messenger of Allāh (God's peace and blessings be upon him) said, 'The purification of a utensil, when a cat has licked it, is to wash it once or twice.'" Qurrah is a trustworthy narrator according to the traditionists.[67] The beasts of prey are mentioned in the tradition of Ibn 'Umar from his father, who said, "that the Messenger of Allāh was asked about water and about the leftover of beasts of prey and other animals. He said, 'If the water is more than two *qullahs* it does not retain impurity.'"[68]

Mālik held the view that water leftover by a dog is to be spilled and the utensil is to be washed, but not for the number of times mentioned in the tradition, for the water the dog has lapped up is not unclean. He did not require the spilling of things other than water, which a dog had licked. The reason he gave was that the tradition opposes a general principle of the Qur'ān, "So eat of what they catch for you."[69] By this he meant that if a dog is considered unclean the prey it catches should also become unclean by its touch or its saliva. He also supported this interpretation by saying that number is not a condition in the washing of unclean things. He held that this washing is merely an act of worship. He did not rely on the remaining traditions as they were weak in his view. The net result is that he did not follow the complete implication of an authentic tradition when it opposed a principle of the Qur'ān.

Abū Ḥanīfah followed a different course. He did not rely on the principle of the Qur'ān in this case, but derived a principle from all the traditions taken as a whole. He said that the *ḥukm* of each animal in this case is related to the permissibility of its flesh. If the flesh of these animals was permitted for consumption their leftovers were also taken to be clean.

Al-Shāfi'ī following the literal meaning of the tradition considered the dog and its leftover to be impure. Ibn Rushd tries to give a justification for this by saying that perhaps he (al-Shāfi'ī) meant that the uncleanliness lies in the saliva of the dog. He then quoted an opinion of Ibn Rushd, his grandfather, that the tradition could be contemplating rabid dogs. This was objected to on the ground that a rabid dog usually shies away from water. He then proceeded to give his own justifications to find a rational basis for the tradition.

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[67] Ibid. 21.

[68] Ibid.

[69] Qur'ān 5 : 4

We see here the two earlier jurists interpreting away individual narrations when they clash with the principles of the Qur'ān, or even general principles derived from a number of sources. Al-Shāfi'ī, on the other hand, finds no difficulty in restricting the general principles with the individual narration as the general principles are not definitive (*qaṭ'ī*) in his view. An individual narration (*khabar wāḥid*) is sufficient to restrict the meaning in the Qur'ān.[70]

About Abū Ḥanīfah's method, Ibn Rushd has the following to say:

> Abū Ḥanīfah upheld, as we have said, the uncleanliness of the leftover of a dog, and did not deem number to be a condition for the purification of the utensil licked by the dog, as this is opposed, in his view, by analogy arising from [the principle of] the washing of unclean things, that is, the point considered here is the removal of filth alone. This conforms with his practice of rejecting individual narrations when they are opposed to principles. The Qāḍī (Ibn Rushd) said, "He, thus, used a part of the traditions and did not employ others, I mean, he used those out of them that did not conflict with the principles, and he did not use those that clashed with the principles. He supported this with the assertion that it was the opinion of Abū Hurayrah, who had narrated the tradition."[71]

This clearly explains Abū Ḥanīfah's analytical method and the accommodation of minor principles within a major principle.

In another case the Ḥanafites quote a large number of principles to evade the literal implication of a tradition in order to maintain

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[70] For the details of this opinion see al-Shāfi'ī, *al-Risālah*, 556–58.

[71] Ibid. 1:22

وأما أبو حنيفة فقال كما قلنا بنجاسة سؤر الكلب ، ولم ير العدد في غسله شرطًا في طهارة الإناء الذى ولغ فيه لأنه عارض ذلك عنده القياس في غسل النجاسات ، أعنى أن المعتبر فيها إنما هو إزالة العين فقط ، وهذا على عادته فى ردّ أخبار الآحاد لمكان معارضة الأصول لها . قال القاضى : فاستعمل من هذا الحديث بعضًا ولم يستعمل بعضًا ، أعنى أنه استعمل منه ما لم تعارضه عنده الأصول ولم يستعمل ما عارضته منه الأصول ، وعضد ذلك بأنه مذهب أبى هريرة الذى روى الحديث .

analytical consistency. This is the case of the return of a commodity by the buyer due to a defect. Mālik and al-Shāfi'ī consider *taṣriyah* to be a defect in which an animal's milk is blocked by the seller in the udder for a number of days so as to give the impression that the animal yields a substantial quantity of milk. These two jurists, who are counted among the Ahl al-Ḥadīth, rely on the well-known tradition of *muṣarrāh*. This is the saying of the Prophet, "Do not block the milk of camels and cows (to cheat in sale). If one does this, then, the buyer has two options, either to keep it (the animal) or to return it along with a *ṣā'* of dates."[72] They said that the option of returning the animal is granted to the buyer because of *taṣriyah*, and this indicates that it is an effective defect. Further, they maintained that the seller in this case is a swindler, which in itself becomes a defect similar to all other admissible defects. They apply the tradition in its literal sense. The Ḥanafites do not. Ibn Rushd is quoted again to explain what the Ḥanafites say:

> Abū Ḥanīfah and his disciples said that *taṣriyah* is not a defect because of common knowledge that whoever buys a goat and discovers later that its milk is not much, cannot designate it as a defect. They also said that the tradition of *muṣarrāh* does not obligate practice due to its deviation from general principles. This deviation from principles is (seen) from different aspects. Among them is its conflict with the saying of the Prophet (God's peace and blessings be upon him), "(Right to) profit is through a corresponding liability for loss."[73] This is a principle agreed upon. Among them is also its conflict with the prohibition of selling food for food with a delay, which is not permitted by agreement (of the jurists). Further, (compensation in) perishable property is undertaken through payment of its value or its like, and granting a *ṣa'* of dates as compensation for milk is neither of these. Moreover, there is an exchange of an uncertain quantity of food, that is estimated (*juzāf*), with one of known measure as the milk with which the seller caused a deception is of an unknown quantity and, further, it can sometimes be more and sometimes less while the compensation here is fixed.[74]

[72] Ibn Rushd, *Bidāyat al-Mujtahid*, ii, 132.

[73] This principle governs a large number of cases in Islamic law.

[74] Ibn Rushd, *Bidāyat al-Mujtahid*, ii, 132.

We have tried to show through these few examples that the methodology followed by the Ḥanafite jurists was based on the analytical method, however rudimentary. These jurists usually took legal principles as the "authoritative starting point for legal reasoning from which [they sought] grounds of decision by deduction."[75] Their method was not based upon their own whims or fancies as the term *ra'y*, when misunderstood, as it usually is, might indicate. The picture painted about their methods by the later Shāfi'ite jurists and traditionists, and as recorded by Goldziher, is certainly not true. Their methodology may not have appealed to the Ahl al-Ḥadīth, but it was certainly one that would appeal, under the given circumstances, to the judicial mind, even today.

As further evidence, we may mention the compilations of al-Karkhī and al-Dabūsī on the principles used by the Ḥanafite school.[76] Al-Dabūsī lists seventy-five principles over which there has been disagreement within the Ḥanafī school or between the Ḥanafī school and other jurists. Al-Karkhī lists forty-one principles. Some of these principles are principles of interpretation, but they are mostly principles of law. Even al-Shāfi'ī has been shown to be using some principles. Consider an interesting principle listed by al-Dabūsī with which al-Shāfi'ī disagrees: "The entire world according to us (Ḥanafites) is divided into two worlds (the Dār al-Islām and Dār al-Ḥarb), but it is one world according to al-Shāfi'ī." A number of rules are then listed as flowing naturally from the positions taken by the two schools.

وقال أبو حنيفة وأصحابه : ليست التصرية عيبًا للاتفاق على أن الإنسان إذا اشترى شاة فحرج لبنها قليلًا أن ذلك ليس بعيب . قالوا : وحديث المصراة يجب أن لا يوجب عملًا لمفارقته الأصول ، وذلك أنه مفارق للأصول من وجوه : فمنها أنه معارض لقوله عليه الصلاة والسلام « الخراج بالضمان » وهو أصل متفق عليه ، ومنها أن فيه معارضة منع بيع طعام بطعام النسيئة ، وذلك لا يجوز باتفاق ، ومنها أن الأصل في المتلفات إما القيم و إما المثل ، و إعطاء صاع من تمر في لبن ليس قيمة ولا مثلًا ، ومنها بيع الطعام المجهول : أي الجزاف بالمكيل المعلوم ، لأن اللبن الذي دلس به البائع غير معلوم القدر ، وأيضًا فانه يقل ويكثر ، والعوض ههنا محدود .

[75] See the methodology of the analytical jurist, as expounded by Roscoe Pound, under section 10.2.

[76] Al-Dabūsī, *Ta'sīs al-Naẓar* (Cairo, n.d.) 1-78, followed by al-Karkhī, *Risālah fī al-Uṣūl*, 80-87, with comments by al-Nasafī.

Now that the use of the principles by the Ḥanafī school has been understood, we may identify some of the broad features of the Ḥanafite theory. The details will be elaborated further in the next chapter when a comparison is undertaken between the theories of general principles and the strict theories.

10.3. Main features of Ḥanafī theory

The Ḥanafite legal theory revolves, as we have tried to show, around the use of general principles. The first task for the Ḥanafī jurist, when he is faced with a new case, is to see whether this case can be accommodated under a general principle. If the case is covered directly by a principle, the jurist finds no difficulty in assigning to it the *ḥukm* of the governing principle. If the case does not fall under one principle, the jurists would try to accommodate it under another principle. A principle that governs a case may itself be a sub-principle of a wider principle, or even be an exemption from it or a corollary.

The question is, where does the jurist find the principle? There are different ways of arriving at a principle.

The principle may be stated explicitly in the Qur'ān in general terms, like the principle governing sales and *ribā*, as in the preceding example: "All sales are permitted except those bearing *ribā*." Again it may be expressed in an authentic *Sunnah*, like the principle: "All entitlement to profit (*kharāj*) is based on a corresponding liability for bearing loss."[77] Sometimes the principle may be derived from a large number of cases already settled by the law, like the general principle derived by Abū Ḥanīfah in the case of animals making the water filthy. By observing that most of the animals whose touch makes the water filthy, for ritual purposes, are those whose meat is also prohibited by the law, he said that the *ḥukm* in such cases depends on the permissibility of the flesh of the animal.

The derived principle is sometimes framed by the jurist himself and sometimes it has been framed by a jurist before him. Is it binding upon a jurist in a later generation to maintain the principle adopted by a jurist in the previous or earlier generation? In the Ḥanafite system, it does appear to be binding, or is at least a practice of the school. Consider the example of *ribā* that has preceded. The principles upheld by Ibrāhīm al-Nakha'ī are recorded and followed by

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[77] الخراج بالضمان

al-Shaybānī and the other jurists in authoritative way. In this particular case, these principles have been derived from traditions narrated by 'Ubādah ibn al-Ṣāmit and others, but al-Shaybānī attributes them to Ibrāhīm al-Nakha'ī. Thus, the system of precedents and that of maintaining a prior principle and decision appears to work in the Ḥanafite system.

Do the principles stated in the texts have the same strength as those derived by the jurists? Certainly not. The derived principle is lesser in strength than a principle stated explicitly in the texts. There are, however, factors that strengthen a derived principle. The opinion of a Companion is binding in the Ḥanafite system, as has been emphasized all along. Thus, a principle derived and maintained by a Companion has greater strength than a principle derived by a later jurist.

There is yet another way of lending greater validity to a principle derived by a jurist. This is the method of *ijmā'* (consensus of opinion). Much has been written about *ijmā'* as a source of law. Some scholars after having undertaken extensive research have concluded that *ijmā'* does not appear to have a very significant role to play in Islamic legal theory. The general idea is that *ijmā'* is not a compiled source like the *Sunnah*, though it has also been transmitted through generations. It can only be gathered from the manuals of *fiqh* produced by different schools. In certain cases, the claims of *ijmā'* in different schools may conflict or be completely different. *Ijmā'* in the Ḥanafite system appears to be a general agreement over a principle or rule of law. The transmission of these principles within the Ḥanafite system may be compared to the upholding of the precedents of the superior courts—the system of *stare decisis*. In certain cases, these decisions may be overruled.

Some Western writers have tried to portray *ijmā'* as some kind of clever device through which the Muslims have tried to authenticate part of their law as well as religion in general.[78] This view is based on a misreading of the function of this principle. In the common law or in Western systems based on it a principle upheld and maintained by a superior court becomes binding on the lower courts. Why should this be a big problem for Islamic law? A principle upheld and maintained by a number of jurists in a certain age becomes binding upon later jurists. If the principle was upheld unanimously it is binding and cannot be overturned. Thus, a derived principle approved by

[78] See, e.g., Noel J. Coulson, *History, passim*.

ijmā' can attain the same strength as a principle stated explicitly in the texts. *Ijmā'* is, therefore, a method of authenticating and validating general principles of law. It is, however, exclusively a judicial function, and extending it to politics or theology may be possible, but is not what was intended by the jurists, whose definition of the principle excludes all such meanings.

This, then, was the methodology that has been termed as *ra'y* by those who criticise the Ḥanafites. It may appear difficult to understand why, because this is quite similar to the method that is used in the courts of law today. The allegation of the use of *ra'y* appears to be based on a popular mood or feeling rather than on a sound legal basis. This will be explained when we introduce the strict theories of interpretation in the next chapter. To end this chapter we may list some of the main features upon which the Ḥanafī theory relies:

1. The definitive nature of the general word (*'āmm*) upon which the general principle is based.

2. The use of the general principle as a proposition from which legal reasoning is to proceed and the law is to be extended. The principle may be stated explicitly in the texts or it may be derived by jurists from a number of cases already settled by the law.

3. The opinion of a Companion from which the idea of a precedent is derived and which is used to strengthen a general principle.

4. *Ijmā'* or consensus of opinion which is used to secure a definitive status for a principle that has otherwise been derived and is not stated explicitly in the texts.

5. The non-acceptance of the implication of a *khabar wāḥid* when it conflicts with an unrestricted general principle that cannot be restricted by it. The report in such cases is usually assumed to apply to some other case.[79]

These features of the Ḥanafī theory led to the rapid development of the law through the use of the flexible general principles. The use of the general principles also enhanced the internal consistency of the system. This striving after consistency indirectly served as a method for warding off or evading the effect of traditions that

[79] See the examples and the views of Ibn Rushd listed in section 10.2.

were either weak or were inconsistent with the overall system. The method focused no less on the text of the tradition than on its chain of transmission. It even permitted the use of some traditions with weak *isnād* when their text conformed with the general principles, because in such a case the meaning was already included within the implication of the principles. Had these weak traditions not been there, the meaning could have been derived directly from the principles through deduction. To those who gave more importance to the chain of transmission of a tradition rather than its content, this must have appeared to be a strange situation, that is, rejection of a tradition with a sound chain sometimes and acceptance of a tradition with a weak chain on other occasions. The goal, however, for the Ḥanafīs was analytical consistency and the formation of general principles.

The other major point pertains to the opinion of a Companion. We have seen that when an opinion of a Companion existed on a certain issue, for the Ḥanafīs it was the opinion of the Companion that determined the meaning of the texts. The assumption was that the Companion with his better knowledge knew what the meaning was in such cases. The Ahl al-Ḥadīth, most probably, considered this to be a preference given to the opinion of a Companion over the *Sunnah* of the Prophet, as they took the position that it was the *Sunnah* that was to determine the meaning of the Qur'ān; if the opinion of a Companion conformed with the *Sunnah* it was to be accepted, but if it clashed with it, such an opinion was to be rejected.

The result of such a methodology was that the traditions based on individual narrations were not applied literally. They were checked against the general principles, and if found to be consistent with them they were accommodated, otherwise they were assumed to apply to some other case, not the one covered by the general principle employed. Al-Shāfi'ī was later to switch the position around by reducing the strength of the general principle. When the general principle was weakened, the individual narration had to be applied irrespective of its content, as long as its chain of transmission was complete. If such a tradition opposed the general principle, the principle was assumed to be restricted to the extent of the implication of the tradition.

The methodology of the Ḥanafīs was, therefore, based on certain major assumptions that had a significant impact on the outcome of the final opinion, as well as on the manner in which the sources were utilized. We will see in the next chapter how al-Shāfi'ī restricted or modified each one of these assumptions in his new theory of interpretation.

Chapter 11

Theories of Strict Interpretation

The struggle between the Ahl al-Ra'y and the Ahl al-Ḥadīth in Islamic law is actually a struggle between judge-made law and literal interpretation of the statutes or texts. It is a struggle that appears to have existed in every legal system, and it certainly exists today in Western legal systems. To the layman, or even to some lawyers, the judge appears to be legislating when he is using general principles of the law. He appears to be taking over the function of the legislature instead of discovering and applying the "intention of the the founding fathers" of a constitution or the intention of the framers of the law. In fact, the views of the Realists indicate that the judge uses his own opinion in the light of his convictions, and the statute is of little consequence. Thus, in a way the methodology of the judge according to the Realists is based on *ra'y* (personal opinion) rather than on the statute. In Islamic law too the developments were similar.

If a layman looks at opinions in the cases discussed in the previous chapter, where the jurists applying general principles appear to have ignored or rejected authentic traditions, and if the reasoning behind these opinions is not explained to this layman or is not understood by him, he will most likely believe that his religion is being distorted, or the law of Allāh and the commands of the Prophet are not being followed. This appears to have happened early in Islamic law. The movement of the Ahl al-Ḥadīth could have been associated with political opposition, as the early jurists including the Ḥanafīs have generally been part of the ruling circles. This can be concluded from the appointment of Abū Yūsuf, the disciple of Abū Ḥanīfah, as chief

judge by the Abbasids.[1] The resentment in some quarters against these jurists must have been quite strong when al-Shāfi'ī appeared on the scene.

If the movement of the Ahl al-Ḥadīth meant the complete domination of literal application of traditions, whatever their authenticity or strength, then, al-Shāfi'ī did not support this movement completely. He provided a barrier between the earlier jurists and the extremist element of the Ahl al-Ḥadīth. A brief explanation of what al-Shāfi'ī did, when he expounded his new theory, will confirm this fact.

11.1. Modification of existing legal theory by al-Shāfi'ī

To distinguish between the methodology employed by the Ḥanafīs and that formulated by al-Shāfi'ī, we shall focus on those points that have been listed as the foundation of Ḥanafī method. These distinctive factors are: the use of the general word to convey a definitive (*qaṭ'ī*) implication; the use of the general principle as a starting point for legal reasoning; the opinion of a Companion; the use of *ijmā'* (consensus of opinion); and the non-acceptance of the *khabar wāḥid* in certain cases, when it opposed the definitive general principle.

The major issue from the point of view of the Ahl al-Ḥadīth was that the traditions reported through individual narrations were not accepted by the earlier schools, when they opposed a definitive general principle. This gave the impression that the earlier schools or jurists were not granting the *Sunnah* its proper status as a source of law. We have already shown that the Ḥanafīs and sometimes the Mālikīs used general principles to check the authenticity of a tradition reported through a single Companion in the first generation. This, then, became a primary goal for al-Shāfi'ī, that is, to secure a status for the *khabar wāḥid* that would ensure its acceptance without any qualification or restriction. To do this he had to demolish the position taken by earlier jurists on each of the listed points, as all those points are related either directly or indirectly to the acceptance of the *khabar wāḥid*.

The genius of al-Shāfi'ī lies in the recognition of each of these points in the methods of earlier jurists, especially in the Ḥanafī method, and in systematically opposing each point. By doing this

[1] It is in this capacity that he wrote his well-known book *Kitāb al-Kharāj*.

he developed his own theory. Why did al-Shāfi'ī do this? Did he consider the methods of the earlier jurists as irrelevant for Islamic law? Perhaps he did, but there must be some deeper underlying reason. The answer has been provided earlier, and shall be discussed in some detail later in this chapter.

11.1.1. The *Sunnah* governs the meaning of the Qur'ān

The first thing al-Shāfi'ī did was to secure a dominating status for the *Sunnah*, as compared to the general principle or the opinion of a Companion. This he did by asserting that the *Sunnah* governs the meaning of the Qur'ān. It is couched in the proposition: *al-sunnah qāḍiyah 'alā al-Qur'ān*, that is, the *Sunnah* is the decisive authority for determining the meaning of the text of the Qur'ān.[2] Thus, if the opinion of a Companion existed about a text of the Qur'ān, and this meaning differed from the explanation of that meaning in the *Sunnah*, the meaning in the *Sunnah* would be given preference. The opinion of a Companion would be assumed to be analogy constructed upon the meaning found in the Qur'ān. Considered as analogy, which was a source weaker than the *Sunnah*, the opinion of a Companion could neither be preferred over the *Sunnah* nor could it be used to interpret the Qur'ān (that is, in cases where the meaning in the *Sunnah* was different from the implication in the opinion).

What if the opinions of all the Companions, or of a majority of them, converged on a point, that is, there was a consensus of opinion (*ijmā'*)? Al-Shāfi'ī did not reject outright such an opinion, but he denied the possibility of such an occurrence in practice. He gave a number of arguments in his book *al-Risālah*.[3] It is important to note that here we are not considering the view of the later Shāfi'ī jurists, who accepted the principle of *ijmā'*, in a different form, a form almost the same as that of the Ḥanafīs, because of which Western writers have been led to believe that there was a "common legal theory." The truth is that *ijmā'* as such does not fit in well with Shāfi'ite legal theory, and we find the later Shāfi'ite jurists using *ijmā'* to support an occasional underlying cause (*'illah*) determined by them. In the Ḥanafī system, discussed in the previous chapter, we saw that the doctrine of *ijmā'* had a very positive role to play; it was used to render a general principle definitive, which could not be restricted by a probable (*ẓannī*) source.

[2] This is the major thesis of al-Shāfi'ī's work.

[3] See al-Shāfi'ī, *al-Risālah*, 471–77.

The assumption that the *Sunnah* governs the meaning of the Qur'ān could only be true if the *Sunnah* could restrict as well as enlarge the meanings found in the Qur'ān. Restriction meant the restriction of a general word, while expansion or enlargement of the meaning meant what has been called *ziyādah 'alā naṣṣ* or an excess over the meaning in an existing text. We shall not discuss the latter issue in this book, as it will involve us in too many details and relegate the larger, more obvious, issues to the background. Those interested can trace it in any book on *uṣūl*, once the main points have been grasped.

Let us now move to al-Shāfi'ī's views on the general word through which the commands or proscriptions are expressed.

11.1.2. The general word and the general principle

As has been stated earlier the general principle, or the *qā'idah kulliyah*, used by the Ḥanafīs was based upon the definition of the general word (*'āmm*). This was taken to be definitive (*qaṭ'ī*) by them, so that an individual narration, the implication of which was probable, could not restrict this general principle, and the general principle was given preference over such a tradition. As long as the general word was treated as definitive, the strength of the individual narration could not be asserted in comparison. The first task for al-Shāfi'ī, therefore, was to demolish the strength of the general word. This he did in his thorough and systematic fashion. He tried to show that a general word never includes all its categories; something is excluded at the time of the initial application.[4] Another rule with the Ḥanafīs was that though the general word was definitive, once it had been restricted by a strong evidence it became probable and could now be restricted by any evidence, even an individual narration.[5] In other words, the Ḥanafīs maintained that the general word was like a closed room containing its categories within it. The door to this room could only be opened by a strong key, the restricting evidence, which could then enter the room and remove one or more categories from it. Once this door had been opened by a strong evidence or key, it could not be closed again and even weaker evidences could enter the room and remove individual categories. Al-Shāfi'ī maintained that though this

[4] Ibid. 369–87.

[5] This is not an unrestricted principle with the Ḥanafīs, because in certain cases they may use the individual narration.

room, the general word, initially included most of its categories, the door of this room was never closed. A *ẓannī* evidence could enter it with ease and remove individual categories.

11.1.3. The need to strengthen the *khabar wāḥid*

Once al-Shāfi'ī had accomplished this he concerned himself with the minimum standards for a probable evidence.[6] The Ḥanafīs, it may be mentioned, sometimes accepted weak traditions when they were compatible and consistent with the general principles. They could also accept the weak traditions when a general principle had been restricted, that is, rendered probable, as long as this tradition presented an advantage and did not disturb the overall analytical consistency of the system. Thus, their safeguard against apocryphal material was that it must be consistent with the general propositions of the law.

Al-Shāfi'ī laid down the rule that if the chain of transmission of the tradition was sound and complete, the tradition would have to be accepted without any further questions about its contents or consistency. If, however, the chain was defective or unsound, the tradition was to be rejected irrespective of its content. Why should he have done this? It is possible that a tradition with an incomplete chain could still be authentic. Al-Shāfi'ī laid down these rules for two possible reasons. First, that weak traditions should not be able to restrict general rules, which he had now rendered probable and easy to restrict. Permitting weaker traditions could have meant disaster for his theory as there was no protection for the general word, as could be found in the Ḥanafī system. This would also enable certain jurists with strong literalist tendencies to erect the law on the basis of weak traditions and put an end to its consistency. The second reason was that there should be some protection against fabricated traditions.

In the Ḥanafī system the safeguard was the general principle itself. There was an emphasis in that system on the text and content of the tradition rather than on its *isnād*. If a tradition clashed with a general principle and it was an individual narration it could be rejected for opposing the principle. If it was consistent and compatible with the principle, accepting it would do no harm. This protection had been removed from the proposed Shāfi'ite system. Al-Shāfi'ī, therefore, laid down the rule that a tradition with a complete *isnād* had to be acted upon even if it restricted a general word, but a tradi-

[6] Al-Shāfi'ī, *al-Risālah*, 369.

tion with an incomplete chain was not admissible.[7] The second part of the rule kept the extremists among the Ahl al-Ḥadīth in check.

11.1.4. The opinion of a Companion

Another point that al-Shāfi'ī had to deal with was the question of precedent. The Ḥanafī jurists tried to maintain the general principles and even decisions handed down to them by earlier jurists. This was linked to the opinion of the Companion of the Prophet (*qawl al-ṣaḥābī*). They maintained that it was binding upon them to follow the opinions of the Companions. A principle maintained by a later jurist could usually be traced to a Companion. In the first example quoted in the previous section, al-Shaybānī relates principles from Ibrāhīm al-Nakha'ī.[8] It would be understood, if it is difficult to verify, that those principles would be attributed to Ibn Mas'ūd, a well known jurist and the Companion of the Prophet, or to another Companion. The assumption was that the Companion was in the best position to know the actual state of the law as laid down by the Prophet.[9] Thus, a later jurist would be under an obligation to maintain the principle or decision and not overturn it, just as a single judge today may not be allowed to overturn a rule or principle established by a full bench or a higher court.

Al-Shāfi'ī could see this to be a problem for his new theory similar to that of the general word, especially when such a rule was claimed to be agreed upon generally by the Companions, that is, it was based on *ijmā'* (consensus of opinion). He stated that the opinion of a Companion may be accepted, but it was not binding on a jurist, especially when it opposed an established *Sunnah*, even that contained in a *khabar wāḥid*.[10] He also declared that the possibility of the occurrence of *ijmā'* of the Companions was rare, if not impossible.[11] Thus, if the Ḥanafīs maintained that the Qur'ān and the *Sunnah* would be interpreted in the light of the principles established by the Companions, as they were in a position to know better the true intention of the Lawgiver, al-Shāfi'ī maintained that

[7] Ibid.

[8] The principles attributed to Ibrāhīm al-Nakha'ī, in the case of *ribā* above, are found in traditions, especially those related by 'Ubādah ibn al-Ṣāmit and Sa'īd al-Khudrī.

[9] Al-Dabūsī, *Ta'sīs al-Naẓar*, 21.

[10] Al-Shāfi'ī, *al-Risālah*, 476–77.

[11] Ibid. 475.

the Qur'ān and the opinions of the Companions would be interpreted in the light of the authentic *Sunnah*. This is exactly what is meant by the phrase *al-sunnah qāḍiyah 'alā al-Qur'ān* (the sunnah governs the meaning of the Qur'ān). This he explains in his book *al-Risālah*, and has been discussed above.

Let us illustrate this through an example. In the case of unlawful sexual intercourse discussed above, the Qur'ān, as restricted by the *Sunnah*, lays down the penalty of a hundred stripes for an unmarried person, that is, one who is not a *muḥṣan*. This is accepted by all the jurists. In addition to this, the *Sunnah* in an individual narration (*khabar wāḥid*) prescribes the penalty of exile for one year. The Ḥanafīs accept the tradition as authentic. They maintain, however, that two Companions of the Prophet, 'Umar and 'Alī, may Allāh be pleased with them, sometimes awarded this additional penalty of exile and at other times they did not. This shows, they say, that the penalty prescribed by the tradition is not *ḥadd* (a fixed penalty), but *ta'zīr* (discretionary penalty); that is, it is not fixed but depends on the discretion of the ruler. The ruler may choose to award it sometimes, as an additional penalty, and at other times he may not. The Ḥanafīs conclude from this that though the tradition mentions this punishment along with the penalty of a hundred stripes awarded as *ḥadd*, the Companions with their superior knowledge of the texts and the laws knew that the penalty was prescribed as *ta'zīr*. As the opinion or decision of a Companion is binding, the Ḥanafīs consider this penalty as *ta'zīr*. For al-Shāfi'ī, the opinion of a Companion is not binding; that is, when it conflicts with a tradition he may not accept it. In this case, therefore, al-Shāfi'ī considers the additional penalty as part of *ḥadd*, to be awarded all the time with one hundred stripes. He does not take the opinion or decision of a Companion into account in this case. Thus, the *Sunnah* governs the meaning of the Qur'ān here by expanding its meaning to include the penalty of exile, and the opinion of the Companions is not considered binding in this case.

11.1.5. Al-Shāfi'ī's views on analogy

It is well known that al-Shāfi'ī accepted *qiyās* (analogy) as a source of law, and insisted that it is *qiyās* alone that is *ijtihād*.[12] He rejected

[12] Ibid. 477.

istiḥsān used by the Ḥanafīs as being null and void.[13] It may be noted here that the Mālikīs also used *istiḥsān* as a source or principle for deriving the law. Al-Shāfi'ī did accept *qiyās* as a source of law, but it is important to note that *qiyās* has meant different things to different jurists in different ages, and the detailed description of *qiyās* given later by al-Ghazālī, for example, does not conform completely with what al-Shāfi'ī considered to be the valid modes of *qiyās*. *Qiyās* is a somewhat complicated principle, and some of its intricacies shall be explained in the next chapter. For the present we may note that al-Shāfi'ī considered two types of *qiyās* to be valid. We may recall what we said about this as was stated in an earlier chapter.

Al-Shāfi'ī stated explicitly in his books *al-Risālah* as well as in *al-Umm* that *qiyās* is of two types: *qiyās al-ma'nā* and *qiyās al-shabah*. He said:

> *Qiyās* is undertaken from two aspects. The first is when a thing is included in the meaning (*ma'nā*) of the *aṣl*. There is no disagreement about this. [Then] there may be a thing which has some similarity to those in the sources. It is, therefore, associated with the one closer to it or greater in similarity (*shabah*).[14]

Now *qiyās al-ma'nā* as described by al-Shāfi'ī and later even by al-Ghazālī is actually a literal method. The example given earlier was that if the text uses the word "fie," other more grievous acts are included through *qiyās al-ma'nā*.[15] The Ḥanafīs consider this as a literal method and call it *dalālat al-naṣṣ*, that is, the implication of the text. The other type of *qiyās* considered to be valid by al-Shāfi'ī is *qiyās al-shabah*. The examples he gives are of a person trying to determine the direction of the *qiblah* in the desert, say, on a dark night. This is *ijtihād* according to al-Shāfi'ī. The question is whether the person undertaking this *ijtihād* has to be a jurist, an astronomer, or some other kind of expert? Another example is of a person in a state of *iḥrām* hunting an animal. This is prohibited. If he does hunt an animal, say an ostrich, he will be required to deliver for sacrifice a similar (*mithl*) animal as atonement for his offense. Determining what is *mithl* is considered *ijtihād* by al-Shāfi'ī. Here again we do not

[13] Ibid. 503

[14] Ibid. 479.

[15] The Qur'ān says with respect to parents: "Say not 'Fie' unto them nor repulse them, but speak to them a gracious word." Qur'ān 17: 23.

need a jurist to settle the matter, but an expert on the attributes of animals. This kind of *ijtihād* was later called *taḥqīq al-manāṭ*, or verification of physical attributes in a new case, by later jurists like al-Ghazālī. All the cases mentioned by al-Shāfi'ī in *al-Risālah*, even the case of *ribā*, can be accommodated under these two methods, and that is what al-Shāfi'ī does. Thus, al-Shāfi'ī neither mentions *qiyās al-'illah* in his book, nor does he give explicit examples of it. *Qiyās al-'illah*, or analogy by determining the underlying cause is the main method of *qiyās* used by Muslim jurists, and this method was presented in a refined form after al-Shāfi'ī.

It appears that the later jurists of the Shāfi'ī school attributed to him the method of *qiyās al-'illah* as well as that of *ikhālah* by stretching some of the issues discussed by him in *al-Umm*. Al-Shāfi'ī's own explicit statements recorded above do not acknowledge these additional methods. What is *qiyās al-'illah*, as distinguished from *qiyās al-ma'nā* will be explained in the next chapter when we discuss the theory proposed by al-Ghazālī.

If it is true that al-Shāfi'ī himself accepted only these two methods of analogy, regardless of what his followers attributed to him, then, al-Shāfi'ī's theory is even more strict than what it appears at first sight. It becomes a theory that is more or less literal.

We may now turn to some of the other strict theories in Islamic law, and examine their main features very briefly, because they do not differ much from al-Shāfi'ī's theory.

11.2. Ẓāhirī and Ḥanbalī theories

Al-Shāfi'ī 's views did not satisfy the Ahl al-Ḥadīth completely. Soon there emerged the Ẓāhirī school that rejected analogy and attempted to confine all interpretation to the apparent (*ẓāhir*) meaning of the textual evidences. The founder of this school was Dāwūd al-Ẓāhirī. Most of our information, however, about the opinions and theory of the school comes from Ibn Ḥazm and his works. The views of this school have been recorded in considerable detail by Goldziher.[16] This school became extinct over time because of its extreme views. Some of the interpretations of this school, however, have great merit. When the system of interpretation of this school is considered as a whole, and not as a mere deviation from al-Shāfi'ī's views, it represents a new theory in itself; a theory that works without analogy.

[16] See generally Goldziher, *The Ẓāhirīs*.

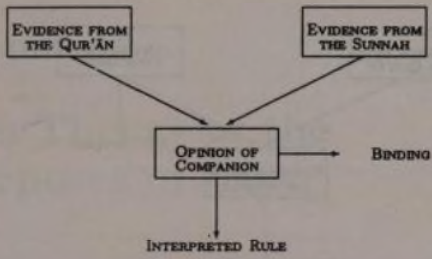
One interesting approach of this school can be witnessed in the situation when two conflicting texts cannot be reconciled and their conflict cannot be resolved to obtain the *ḥukm*. The position taken by the school is that there is no *ḥukm* in this case. The matter is just suspended. This may sound unbelievable to some, who are accustomed to thinking that the judge must provide relief to the parties in each case, but it is typical of jurists dealing with the essential core of the law derived directly from the texts. There is no obligation to reach a verdict, because the jurist is willing to go only as far as the texts will take him. The rest of the issues are left to the flexible part of the law, that is, to the *imām* and his *ijtihād*. The jurist is under no obligation to stretch the meaning if it cannot be discovered directly from the texts.

This school was followed by the Ḥanbālī school, whose founder, Aḥmad ibn Ḥanbal, was essentially a traditionist. His school gives preference to traditions over analogy, by using conditions for traditions that are less stringent than those stipulated by al-Shāfi'ī. As Imām Aḥmad ibn Ḥanbal, the founder of this school, was involved more in the work on traditions, his views on the law as well as on legal theory were collected later by his pupils and transformed into a theory. This theory does not differ too much from the theory expounded by al-Shāfi'ī, except in details. The only major difference was in the somewhat relaxed conditions for the acceptance of traditions. With the preference of these traditions over analogy, this theory appears even more strict than that of al-Shāfi'ī, yet surprisingly Ḥanbalī law in some cases may be found to be more liberal than that of the Shāfi'ī school.

Turning to what the above analysis reveals to us so far, we find that the influence of the Ahl al-Ḥadīth that appears to have started much earlier[17] continued even after al-Shāfi'ī 's time. The Ḥanafī school had no option but to lay down a system through which the opinions of the schools would be followed. This is a complete hierarchy of classes of jurists beginning with the *mujtahid muṭlaq* (the absolute jurist) at the top, that is, Abū Ḥanīfah. Following him is the *mujtahid fī al-madhhab*, a status granted to Abū Yūsuf and al-Shaybānī. Such a jurist performs *taqlīd* as far as the principles of in-

[17]The clearest evidence of this influence is 'al-Shaybānī's book *Kitāb al-Ḥujjah 'alā Ahl al-Madīnah*, in which al-Shaybānī tries to defend the use of traditions by his school. Incidentally, Schacht said that he could not consult this book while formulating his views in his *Origins of Muḥammadan Jurisprudence*, because of the war. One wonders why he did not do so afterwards.

Figure 11.1: The Ḥanafī Method



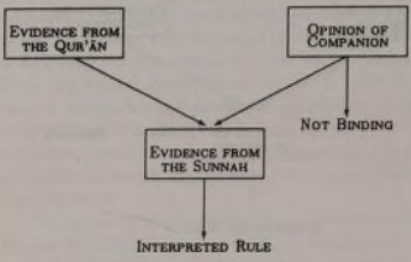
terpretation are concerned, but derives the opinions independently. As we go down the ladder, we arrive in our own times at the jurist who is hardly better than a layman. Similar grades are also found in the Shāfi'ī school.

The influence of the Ahl al-Ḥadīth continues even today, though it is not very clear what it means in modern times, as far as the law is concerned. It is for this reason that modern scholars are demanding the derivation of general principles of the *sharī'ah*, so that the flexibility of the system witnessed in the earlier age can be restored. This demand is not new as outstanding jurists like Imām al-Ḥaramayn (al-Juwaynī) and al-Ghazālī had started the process by the end of the fifth century of Islam, as we shall try to assess in the next chapter. Al-Ghazālī's theory was possibly the last comprehensive theory of interpretation propounded in Islamic law.[18]

If a general trend is to be determined in the light of what has been said above without taking into account the two spheres of the law explained earlier, the conclusion would be that the increasingly literalist tendencies led to cessation in the growth of the law and ultimately to rigidity. Such a conclusion is drawn by Western writers. If, however, the idea of the two spheres of the law, the fixed and the flexible, is kept in the forefront, it would be easy to see that the role of legal theory changed with the passage of time. The Ḥanafī and

[18] Jurists like Ibn Rushd and al-Shāṭibī may also be said to have provided some independent ideas, if not independent theories.

Figure 11.2: The Shāfi'ite Method



Mālikī theories developed in the earlier period when the distinction between the fixed and flexible spheres was not clearly visible. Once this distinction emerged, separate theories were developed. Thus, the strict theories are designed to serve the fixed and eternal part of the law. For the flexible sphere, that is, the area within the jurisdiction of the *imām*, al-Ghazālī was to come up with a new and vibrant theory. We shall now turn to this theory.

Chapter 12

The Theory of the Purposes of Law

Al-Shāfi'ī died at the beginning of the third century of the Hijrah. He had proposed a strict theory of interpretation, as we have seen in the previous chapter. His proposals were followed by two main theories that reflected an even greater inclination toward strict or literal interpretation. From the time of al-Shāfi'ī's death up to the end of the fourth century, or the beginning of the fifth century, we witness a period of relative quiet. The jurists were active, but their activity appears to be an assessment of the main theories of interpretation. Slowly, the extreme literalist views were weeded out. The Ẓāhirī school became almost extinct, except for some parts of Spain. The Ḥanbalī school also faced total extinction, and was to be revived later by Ibn Taymīyah and Ibn Qayyim al-Jawzīyah.

Al-Shāfi'ī's theory, being less strict than the two later theories, was not rejected outright and his views and ideas were reassessed as his following grew. The concepts presented by him were stretched and expanded, especially those related to analogy and *ijmā'*, to yield not only a more flexible theory, but a more flexible and accommodating system of law than the one originally proposed by al-Shāfi'ī. By the end of the fourth century or the middle of the fifth, al-Shāfi'ī's popularity, as reflected in his modified theory, appears to have grown, two and one-half centuries after his death, and the jurists of his school appear to be poised for a systematic exposition of Shāfi'ī law and legal theory.

A period of feverish activity began in the legal field. It was not only Shāfi'ī jurists who started producing the well-known works on

law, but the Ḥanafī jurists too. The latter stated the theory of their predecessors by deriving it from the earlier decisions. This period witnessed the emergence of the giants in Islamic law: al-Sarakhsī, al-Bazdawī, al-Juwaynī, al-Ghazālī, al-Rāzī, al-Marghinānī, al-Kāsānī, al-Qarāfī, Ṣadr al-Sharī'ah, al-Nawawī, and many others. The fifth and sixth centuries were important for developments in the law and legal theory as well as for the revival of the Islamic sciences as a whole. This is evident from al-Ghazālī's works.

Al-Ghazālī's works show that he was working for a revival not only of the Islamic sciences as a whole, but also of law and legal theory. Building on the views of his teacher, al-Juwaynī, he expanded al-Shāfi'ī's theory by incorporating the views of the earlier jurists like Abū Ḥanīfah, Mālik, Abū Yūsuf, and al-Shaybānī. The result of his efforts was a new theory that assimilated the essence of earlier decisions and theories. Although he remained faithful to his school and did not claim that it was a new theory, it would be a mistake to assume that al-Ghazālī's theory is the same as al-Shāfi'ī's theory. The new theory he presented is far more flexible and complex than the strict theory proposed by al-Shāfi'ī.

Al-Ghazālī's views were debated by the jurists for centuries, but were never practiced. The reason was that the function of his theory was not to develop the fixed part of the law, a law that was by now well settled. His new theory appears to be directed more toward the *imām*, that is, toward the development of the flexible sphere of the law that changes with the times. This powerful theory is the theory of the purposes of the law.

12.1. Probable reason for evolving a new theory

One way to understand the phenomenon that could be the cause of the new theory is by saying that a literal system of legal interpretation falls back on the purposes of the law. It is forced sooner or later to take the whole law into consideration for arriving at the meaning of an individual text or statute, which is the same thing as interpretation in the light of the purposes of the law. This has occurred in Western law as well, as is explained by Karl N. Llewellyn when he says, "If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no

purpose or objective, is nonsense."[1] To show how this is achieved, he adds:

> But a court must strive to make sense *as a whole* out of our law *as a whole*. It must, to use Frank's figure, take the music of any statute as written by the legislature; it must take the text of the play as written by the legislature. But there are many ways to play that music, to play that play, and a court's duty is to play it well, and in harmony with the other music of the legal system.[2]

Literalist tendencies in Islamic legal theory arise not from a weakness of method as such, but from a desire to discover the true intention of the Lawgiver, to stay as close to the text as is possible. This is an inherent feature of Islamic legal theory and has been built into its design, as has been explained in detail in the first part of this book.

The credit for initiating the process through which the *maqāṣid al-sharī'ah* or the purposes of law were unveiled, or through which the whole law was to be taken into consideration while interpreting an individual text, goes to the Shāfi'ite jurists, but the refinement of this new theory of Islamic law did not end with them. Many other jurists cut across school boundaries and participated in the process, a process that cannot be said to have come to an end. Voluntary acceptance of the important ideas of this new theory without bias, and of participation in its development, reflects the strength of this theory of jurisprudential interests.

Before this process of development can be traced, however, the nature and strength of the strict theories need to be reviewed in the light of the nature of the texts or sources of Islamic law. This will indicate why it is necessary that the purposes of the law must emerge out of the traditional legal theory.

12.2. Strict theories and the texts

The brief explanation of strict theories in the previous chapter reveals a few significant features. The first is that the jurists were very careful about accepting sources of law that could not be justified on the

[1] Karl N. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed," *Vanderbilt Law Review*, iii, 395, 400 (1950).

[2] Ibid. 399. Footnote omitted. Emphasis in the original.

basis of the texts of the Qur'ān and the *Sunnah*. The only source, besides the texts and consensus, that met the criteria laid down by all the Muslim jurists was a strict form of analogy or syllogism. Some schools were able though to justify the acceptance of the opinion of a Companion as a source of law. Second, the entire methodology of the jurists, whether based on literal interpretation or on *qiyās*, was directed toward keeping the rule tied down to the text. This ensured the discovery of the true intention of the Lawgiver. The third feature is conspicuous by its absence; there was no method of extending the law to cases that might be totally unrelated to the texts, and which could not be covered by means of strict *qiyās*.

The effects of such a narrow or restricted theory of interpretation can be countered if the texts from which the law is derived provide a large amount of source material. One way of estimating the number of fundamental evidences is to undertake a statistical analysis of these sources. Such an analysis must be seen from the point of view of a jurist involved in the analysis of this law. One book that is definitely free of school bias and in which the author has done his utmost to link each evidence with the derived rule is Ibn Rushd's *Bidāyat al-Mujtahid*. It covers almost the entire corpus of the law, including inheritance. The number of verses from the Qur'ān quoted in this book to prove the *aḥkām* are five hundred and sixty. If the verses repeated are excluded we are left with about five hundred verses. Out of these the bulk of the verses regulate the *'ibādāt* including *zakāh*. This leaves us less than a hundred verses for the remaining law. A large number of these is about inheritance, *ḥudūd* penalties, marriage, divorce, and other issues of personal law. Now, if a new set of facts, not covered by these verses, is faced by the jurist he turns to the *Sunnah*.

In the case of traditions, the ratio is the same, although the number of legal traditions is roughly three times the number of Qur'ānic verses dealing with the law. Ibn Rushd has quoted traditions on one thousand seven hundred and ninety-nine occasions in his book. Some of these traditions have a large number of chains, but the implication is the same. He quotes a different version of a tradition only where there is an addition or conflicting matter. It may safely be assumed that he has quoted almost all the relevant representative traditions. Out of these traditions about ten percent are repeated, close to twelve hundred relate to the *'ibādāt* including *zakāh*. A number of traditions relate to slavery, to personal law, that is, marriage, divorce, and inheritance. This leaves us with about three to four hundred traditions

that cover the *mu'āmalāt* and the criminal law. Further, one can see that groups of traditions may relate to single topics like inheritance, *ḥudūd* penalties, and the *diyāt*. This leaves us with a limited number of traditions for the remaining issues.

Besides this, the number of cases where underlying causes have been determined can also be counted. The cases of consensus, *istiḥsān*, and *maṣlaḥah mursalah* are also limited, not exceeding a dozen in each case. A survey of the manuals of law, with reference to the texts, will indicate that wherever an underlying cause could be discovered and used to extend the law, it has already been discovered and used by the jurists. This process appears to have been completed at the latest by the fifth century, if not earlier.

12.3. The design of traditional legal theory and the extension of the law

This analysis reveals that all the areas of the law for which texts are found have been developed fairly thoroughly and effectively by the jurists. In those areas where the law has not been explicitly stated, but where extension is possible by means of consensus and analogy, have also been developed. Nevertheless, as the traditional theory operates on the texts in a way that the derived law must be directly or indirectly related to the literal content of the texts, the effect of such extension has been limited. What we see is a theory designed to keep the law tied to the text when it is working on a limited number of sources. How, then, can the law be expected to be available for other areas of human activity and new developments?

It may be argued that there were other methods of extending the meaning of the texts, like *istiḥsān* used by the Ḥanafīs and Mālikīs, *ikhālah* used by Shāfi'īs, and *istiṣlāḥ* used by the Mālikīs. While this is true, it becomes obvious to anyone occupied with the study of Islamic law that the number of cases where these principles have been actually used is limited. It is mentioned by some that Mālik may have used it himself only in one case.[3] The cases where the principle of *maṣlaḥah*, for example, has been employed are not more than a dozen, as mentioned by Ibn Rushd. The same may be said of the highly publicized principle of *istiḥsān* used by the Ḥanafites. In

[3]Majid Khadduri maintains that al-Shāfi'ī and Saḥnūn both cite the case of *'arīyah*, the sale of fresh dates for dry dates, which was otherwise prohibited. Khadduri, s.v. "*Maṣlaḥa*," *Encyclopaedia of Islam*.

many of the cases it is merely the preference of a general principle over strict analogy. Thus, the rule would have been settled by analogy if *istiḥsān* had not been used. The cases where it has been based upon necessity (*ḍarūrah*) are also limited. The only conclusion that can be drawn from this is that strict theories are designed in such a way as not to let the law extend beyond a limited sphere, a sphere in which the texts operate explicitly, with some extension through strict analogy.

A community, however, that has chosen to live by the law of Allāh, and which consistently maintains that "Islam is a complete code of life" definitely expects more. It would expect justice, both distributive and legal, according to the law of Allāh in every area of human activity. Thus, it would expect all the branches of government—the legislature, judiciary, and the executive—to be regulated by this law. It would expect human and economic rights to be clearly spelled out and enforced by this law. It would expect this law to control and regulate all commercial activity within the Muslim state, and to punish all offenses against it whether it is petty theft or grand larceny and white-collar crime. Strictly speaking, when all human activity is to be regulated by the dictates of the *sharī'ah*, there is no reason why even the rules of traffic should not be derived from its principles. All this is beyond the design of the strict theories of interpretation.

It is, however, a firm belief of the jurists that nothing has been left out in the texts, and a rule can be discovered for every situation faced by human beings. The verse of the Qur'ān, "We have neglected nothing in the Book (of Our Decrees),"[4] is cited in support of this view. How, then, is the law in the texts to be extended?

The only way that the law found in the texts can be extended to all areas of human activity is through the general principles of Islamic law. These are found in abundance in the Qur'ān as well as the *Sunnah* of the Prophet. Al-Ghazālī not only laid down methods for the identification of the principles of the Qur'ān and *Sunnah*, principles that ultimately point to the purposes of the law, but he also gave a detailed methodology to be used by the jurist for deriving the law from these general principles. All this could have been a part of al-Ghazālī's grand scheme for the revival of religious sciences. The process had begun, however, in the works of al-Juwaynī, and perhaps even before his time. We will now examine these methods in some detail.

[4] Qur'ān 6 : 38

12.4. Al-Ghazālī's theory of the purposes of law

In this section, we shall show that the new theory propounded by al-Ghazālī emphasized two kinds of reasoning, in addition to the traditional methods of interpretation. These were reasoning from principle and reasoning based on a somewhat wider form of analogy as compared to the narrow syllogism practiced by the traditional methods. We shall also show that these are methods that a judge, in a modern legal system, will not find to be unfamiliar. In fact, he is quite familiar with them. The only difference is that in al-Ghazālī's theory such reasoning is undertaken *with reference to the purposes of Islamic law*, while the modern judge refers to the general propositions of his own legal system, to principles of policy, and even to moral norms, and these are collectively referred to by some as social propositions.[5]

Al-Ghazālī appears to have been accused, in his own time, of inventing a new principle of interpretation or source for Islamic law. He answers this by saying that what he stated was completely within the limits imposed by *qiyās*.[6] His claim appears to be correct, as his explanation of *maṣlaḥah mursalah*, or *istidlāl mursal*, is nothing more than a wider form of analogy, and, therefore, a valid form of *qiyās*. The anxiety of those who questioned him is based on the insistence of al-Shāfi'ī that there are only four sources of law. The fourth principle, he insisted, was the only valid form of *ijtihād*, and this was *qiyās*.[7]

It would be wrong to assume, however, that this expanded form of *qiyās* is the same as that originally proposed by al-Shāfi'ī, even if the later jurists were happy with attributing everything to their *imām*, for this new form of analogy had come a long way from that earlier method.

12.4.1. Al-Juwaynī's proposals

The entire credit for the new theory cannot be passed on to al-Ghazālī, because the inspiration, and indeed many of the details, have come from al-Juwaynī, the Imām al-Ḥaramayn, and are recorded in his book *al-Burhān*, especially in the second volume that deals with *qiyās*. Discussions of these issues must have started much earlier, for

[5] Eisenberg, *The Nature of the Common Law*, 14.

[6] Al-Ghazālī, *al-Mustaṣfā*, i, 286.

[7] Al-Shāfi'ī, *al-Risālah*, 477.

the Ḥanafī jurist al-Dabūsī, well-known for expounding the general principles used by the Ḥanafites, looms large in the works of both al-Juwaynī and al-Ghazālī. There were others like Abū al-Ḥusayn al-Baṣrī (d. 436), who had discussed the problems related to *maṣlaḥah* much earlier. The essential features of the entire theory presented by al-Ghazālī can be gleaned from the works of al-Juwaynī. What al-Ghazālī did was to knit, in his organized and systematic manner, most of al-Juwaynī's ideas into a comprehensive theory. He also changed and refined the terminology used by al-Juwaynī. A theory that appeared ordinary in al-Juwaynī's work suddenly became alive in al-Ghazālī's hands.

The extension of the forms of *qiyās* was not the only proposal made by al-Juwaynī. He generated another idea that led to a number of works on a somewhat different, yet related, subject, as we shall have occasion to see. This was the area of the general principles that can be subsumed under the purposes of Islamic law. Al-Subkī quotes al-Juwaynī as saying that the science of *qawā'id* (general principles of *fiqh*) needs to be developed.[8] This led to the development of the field known as *al-ashbāh wa al-naẓā'ir*. The books dealing with this area are usually divided into independent sections that conform with the approved categories of *qiyās al-shabah*. Many of the general principles appear to have been gathered from Ḥanafite sources, especially the works of al-Karkhī and al-Dabūsī. That the first jurists who formulated these principles were Ḥanafites is acknowledged by the Shāfi'ī jurists.[9] A later Ḥanafite jurist, Ibn Nujaym, also participated in this process, but he appears to rely heavily on al-Suyūṭī's work, and he appears to have read al-Subkī's book mentioned in the previous note. Some passages have been transferred verbatim from

[8] See the introduction in al-Subkī, 'Abd al-Wahhāb ibn 'Alī Tāj al-Dīn (d. 771), *al-Ashbāh wa-al-Naẓā'ir*, 2 vols. (Bayrūt: Dār al-Kutub al-'Ilmiyah, 1411/1991).

[9] See the introduction to Abū al-Faḍl 'Abd al-Raḥmān ibn Abū Bakr ibn Muḥammad ibn Aḥmad Bakr Jalāl al-Dīn al-Suyūṭī al-Khuḍayrī (d. 911/1505), *al-Ashbāh wa al-Naẓā'ir* (Cairo, 1378/1959). He narrates a story about a blind Ḥanafī jurist who had assimilated the entire corpus of *fiqh* under seventeen principles. This jurist kept the principles a closely guarded secret, but every night he used to shut himself in his room and repeat these principles. One day a Shāfi'ī jurist concealed himself in his room, and being blind the old jurist could not see him. With this trick he was able to gain knowledge of the principles. This is, of course, a likely story, but it goes to show that the Ḥanafī jurists were the first to formulate such principles. (An easier way for this Shāfi'ī jurist would have been to read al-Karkhī's book).

al-Suyūṭī's book.[10] He must have relied on Ḥanafite texts also, as he does make some original contributions within the principles. The only jurist, however, who tried to link all these and other principles to the purposes of the law is al-Sulamī, though he treats the worldly purposes of the law with the purposes for the Hereafter. Another jurist who may have been inspired by the same movement is al-Qarāfī. He focused on the art of distinguishing cases falling under separate principles, a process that works within *qiyās* as well as general principles, and is something that is normal practice with modern judges. Some of the principles he deals with pertain to literal interpretation of the texts, but many of these are principles of law.[11]

All this shows how the practices of the Ḥanafites, in their use of general principles, the principles of *maṣlaḥah* attributed to the Mālikites, and the views of al-Shāfi'ī are gathered into a unified whole, a new theory, inspired and initiated by al-Juwaynī. Of course, differences still remained, as will be obvious later. We may now turn to the details of this theory.

12.4.2. Legal theory and the purposes of law

Al-Ghazālī devoted an entire book, *Shifā' al-Ghalīl fī Masālik al-Ta'līl*, to his new theory. He does mention the *maqāṣid al-sharī'ah* in his book *al-Mankhūl*,[12] which apparently was compiled when he was very young, but he does so briefly. Here too the terminology used is different from that used by al-Juwaynī. The general practice of researchers so far, while dealing with the principle of *maṣlaḥah*, has been to mix up al-Ghazālī's views with those of later jurists. This may be a commendable research method, but it causes confusion in understanding a theory that is somewhat complex. We shall, therefore, rely completely on al-Ghazālī's views and resort to the works of the other jurists where an addition may have been made or a point left vague in al-Ghazālī's work has been explained better by some other writer, which it must be admitted is rare. In fact, some of the ideas essential for understanding the complete theory have been left out by later jurists in their attempts to summarize and encapsulate

[10] Ibn Nujaym, *al-Ashbāh wa al-Naẓā'ir* (Bayrūt, 1980).

[11] Al-Qarāfī, *Kitāb Anwār al-Burūq fī Anwā' al-Furūq fī Uṣūl al-Fiqh*, 4 vols. (Bayrūt, 1343).

[12] Al-Ghazālī, Abū Ḥāmid Muḥammad ibn Muḥammad (505/1111), *al-Mankhūl min Ta'līqāt al-Uṣūl* (Damascus, 1970).

al-Ghazālī's views, just as al-Ghazālī may have summarized some of al-Juwaynī's views.

A distinctive feature of al-Ghazālī's work in this book is a shift from the emphasis on what the jurists should do to derive the law to an emphasis on what the jurists actually did for the discovery of this law. In other words, he builds up his theory from earlier practices and decisions. He uses examples from the decisions of the Mālik ites and Ḥanafites to demonstrate the methodology of these jurists in support of his theory. This shows that he is not inventing something new, but is framing a legal theory like it should be framed—from what the judge has already done.[13] He does not, however, confine himself to one school. It may be added here that this approach is visible in the works of many jurists of this time, especially Ḥanafites like al-Sarakhsī and Ṣadr al-Sharī'ah, who build up their theories from what has preceded. In this restricted sense there can be as many theories as jurists who made some original contribution. This, at least, is true of Western law today.

12.4.3. *Qiyās* and the formation of principles

Qiyās (analogy) is used in Islamic law to extend the rule (*ḥukm*) provided in a text for a specified entity or thing to a new case not specified in the text. This is achieved by identifying an underlying cause (*'illah*) for the *ḥukm* in the text. If the same underlying cause can be identified in the new case, the *ḥukm* in the text is extended to the new unspecified case. The validity of such analogy depends mostly on the discovery of the correct underlying cause in the text. It is for this reason that a major portion of the discussions in the works of the jurists on *uṣūl al-fiqh* is devoted to the underlying cause.

A simple way of explaining the operation of strict *qiyās* is through a hypothetical case that may not conform with the actual law.[14] To do so we may consider a number of cases as falling under one category or genus. The basis on which they have been gathered under one category is a common attribute. If one of the cases is identi-

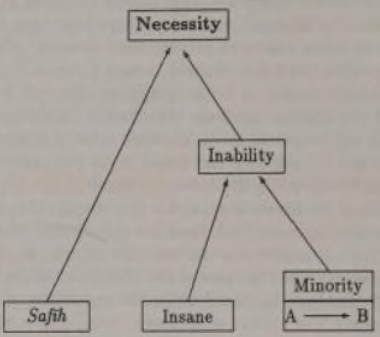
[13] This is what is done in the law. A legal philosopher tries to understand how the system works. After analyzing the work of judges, he tries to formulate a theory that explains how judges discover and apply the law. We have been saying all along that al-Ghazālī's theory has not been put to practice as yet. By this is meant the ways in which general principles are derived and applied.

[14] The following example has been constructed from the illustrations provided by al-Ghazālī (*Shifā'*, 149) and Ṣadr al-Sharī'ah (*al-Tawḍīḥ*, ii, 572).

fied in the texts and the attribute on the basis of which a *ḥukm* has been assigned is also determined, the *ḥukm* can be passed on to all other cases, within this genus, that exhibit the same attribute. We may assume, for example, that minor boys have been identified in the texts as being unable to manage their financial affairs or marriage contracts. The *ḥukm* imposed in such a case is that of *wilāyah* (guardianship), that is, it is the guardians who will manage their affairs. If the effective attribute identified is "minority," the *ḥukm* of *wilāyah* can be passed on to all other cases of minority. Thus, if the minor girl has not been mentioned in the text, her case will also be covered by extending the *ḥukm* of *wilāyah* to her. This operation takes place at the lowest level, and is the case of strict analogy.

We notice, however, that there are other cases where individuals who are not minors are also not able to manage their own affairs. These could be the cases of the idiot (*ma'tūh*) and the insane (*majnūn*). Can they be placed under the supervision and control of the guardian? The answer is obviously "yes," but a new attribute has to be determined that can hold the existing cases and the new cases under a common category. To do this we have to move one step up and say that a suitable attribute is the lack of legal capacity in the case of the minor boy or girl, that is, their inability to grant a valid consent. Is this attribute found in the cases of the idiot and the insane? If so the *ḥukm* of *wilāyah* can be extended to them too. The difference between these two attributes determined as the underlying causes is crucial. At the lower level, we move from one specific case to the next by saying, for example, that 'A' is a minor and is subject to guardianship, but 'B' is also a minor and, therefore, must be subject to guardianship. As we move up the ladder, we leave behind specific (*khāṣṣ*) cases and start entering the area of the wisdom (*ḥikmah*) behind the original case, which will be expressed more in the form of general principles as we move higher and higher. We are framing a general principle if we say that "all persons lacking legal capacity or the ability to give a valid consent will be subject to the *ḥukm* of *wilāyah*." If we move one step higher from this and finally acknowledge that all cases of necessity related to consent will be subject to the *ḥukm* of *wilāyah*, we are no longer in the domain of strict analogy; we have entered the realm of a general and flexible principle, however vague the concept of necessity (*ḍarūrah*) might be. Perhaps, *wilāyah* can now be extended to the *safih* (spendthrift), who is not a minor nor does he lack legal capacity, but is wasting away his fortune. The idea may possibly be extended to commercial law

Figure 12.1: The Structure of Attributes



for financially sick firms and corporations that squander the wealth of the investing public.

According to the terminology of the jurists, when strict analogy is at work, the *'ayn* (specific case—minority in the example—of the attribute) has been acknowledged by the law in the *'ayn* (specific case) of the *ḥukm* : *wilāyah*. When they move up one genus, they would say, for example, that the genus (general category)—inability—of the attribute has been acknowledged in the *'ayn* of the *ḥukm* : *wilāyah*. There are other possibilities too.

As long as these general rules or specific cases are identified in the texts, there is no problem, but the question is whether the jurist is at liberty to derive such attributes or general rules himself on the basis of his general knowledge of the texts of the Qur'ān and the *Sunnah*? This is where the new debate, and the new theory, begin.

12.4.4. The concept of the *munāsib* or *maṣlaḥah*

Al-Ghazālī begins his book, *Shifā' al-Ghalīl*, with a description of the methods for discovering the underlying cause directly from the texts as well as through consensus (*ijmā'*). The method of discovering the *'illah* through the text (*naṣṣ*) covers several techniques. In these cases the text is itself said to indicate the underlying cause, either directly or indirectly. When this is not the case the underlying cause

may be determined by consensus of the jurists. This is known as the method of determining the *'illah* through *ijmā'*. We are not concerned here, at least directly, with the details of these methods. Besides the methods of discovery through the text and *ijmā'*, the *'illah* may be derived (*mustanbiṭah*). It is a method over which Muslim jurists have disagreed extensively, and this is what concerns us here.

The underlying cause discovered through the text or through *ijmā'* is also known as the effective (*mu'aththir*) cause, while the derived *'illah* is known as the suitable or appropriate (*munāsib*) cause. Al-Ghazālī begins the discussion of the *munāsib* by answering the objection raised by the Ḥanafī jurist Abū Zayd al-Dabūsī that suitability (*munāsabah*) is not sufficient by itself for determining the *'illah*, and the causes must be effective (*mu'aththir*), that is, discovered through the text or through *ijmā'*. Al-Dabūsī's argument is that the derived *'illah* is based on *ikhālah* (reflection, conjecture), which is a subjective method and is not persuasive for other jurists.[15] Al-Ghazālī replies that the *mukhīl* (the attribute that comes to dominate the mind of the jurist) is not based on mere reflection, but is something that is persuasive for others too through rational inquiry into the general propositions (*taṣarrufāt*) of the law.[16] The basis of confusion, he says, is the vague definition of suitability (*munāsabah*) and its designation as *ikhālah*.[17] The jurists, according to him, applied a large number of terms to it, thereby confusing the issue. Some of these terms are *mu'aththir* (effective), *munāsib* (suitable), *mukhīl* (reasonable, convincing), *mulā'im* (compatible), *mūdhin* (authorizing the *ḥukm*), and *mush'ir bih* (indicative of the *ḥukm*).[18] Further, he says that some jurists have also mixed up *munāsabah* with other forms of analogy like *shabah* and *ṭard*.[19]

Al-Ghazālī himself focuses on three terms: *mu'aththir*, *munāsib*, and *mulā'im*.[20] He says that *mu'aththir* is the underlying cause that has been determined through the text or *ijmā'*, but this term is applied only to make a distinction between different methods through which the causes are indicated, otherwise it would be possible to call the *munāsib* as being *mulā'im* as well as *mu'aththir*, and the

[15] Al-Ghazālī, *Shifā' al-Ghalīl*, 142.

[16] Ibid. 143.

[17] Ibid.

[18] Ibid. 143–44.

[19] Ibid. 144. A brief explanation of *ṭard* will follow later.

[20] Ibid.

mu'aththir as being *munāsib* as well as *mulā'im*.[21] Attention, however, should be focused on the distinctive factors. What he appears to be saying is that the proper underlying cause can be said to have all three attributes; but the distinction and designation is based on the way they are proved. This he explains through an example.[22]

The underlying cause for the prohibition of wine is the attribute (*waṣf*) of intoxication, because it leads to disputes, enmity, and hatred. This is known through the text and is *mu'aththir* in that sense. However, if it had not been known from the text, we could still have derived the effective *waṣf* as intoxication, insofar as wine attacks and damages the intellect.[23] In this sense the attribute of intoxication is *munāsib* (suitable), because we have not associated the cause with the color of wine, or its smell, or something else, but with a factor that is easily acceptable to human reason.[24] This cause, that is, something attacking the intellect, is also effective (*mu'aththir*) in some sense, but its effectiveness has not been proved through the text or *ijmā'*.[25] Thus, if we say that a group of persons who conspire and participate in the killing of one person should all be subjected to *qiṣāṣ* (retaliation), although the text has not acknowledged this explicitly, the meaning appears reasonable insofar as it prevents a way of wasting human life through the evasion of penalty.[26]

This underlying meaning is termed simply as *munāsib*, and not *mu'aththir*, because the underlying cause has not been fixed through the text or *ijmā'*, even though it can be said to be an effective cause. THE DISTINCTION, THEREFORE, LIES IN THE WAY THE LAW HAS ACKNOWLEDGED THE ATTRIBUTE THAT SERVES AS THE *'illah*.[27]

It is possible, however, that an attribute is acknowledged by the law through the text or through *ijmā'*, yet it may not be *munāsib* (suitable), or understandable in terms of the general propositions of the *shar'*.[28] These are usually the non-rational causes associated with ritual. The examples al-Ghazālī gives are those of the emission of sperm, which is pure in itself, but leads to the obligation of bathing

[21] Ibid. 144–45.
[22] Ibid. 145.
[23] Ibid. 146.
[24] Ibid.
[25] Ibid.
[26] Ibid. 146–147.
[27] Ibid. 147.
[28] Ibid. 147–48.

to achieve ritual purity, or it is like the touching of the genitals when it leads to the nullification of ablution in Shāfi'ite law.[29] Nevertheless, these causes are also designated as *mu'aththir* (effective) even if they are not *munāsib*.

After explaining this, al-Ghazālī raises a question about the *mulā'im* (compatible) attribute. How does the *mulā'im* relate to this distinction between the *mu'aththir* and *munāsib*?[30] The explanation provided by al-Ghazālī in *Shifā' al-Ghalīl* is precise, but there are certain aspects missing when we compare this with his later work *al-Mustaṣfā min 'Ilm al-Uṣūl*. It is to this later work that we may turn now and return to the earlier work later for reconciling some of the discrepancies between the two explanations.

12.4.5. The structure of the attributes and the *aḥkām*

Al-Ghazālī explains that in order to understand this issue the attributes acknowledged by the law are to be conceived as lower categories leading to a genus, which in turn becomes a category of a still higher genus. Finally, a chain of categories and genera is built up till we reach an ultimate genus. The whole structure of attributes displays an ultimate genus at the top and the lowest category at the bottom. This is not all. Facing this structure of attributes is a set or structure of corresponding *aḥkām*.[31] Thus, an attribute (*waṣf*) in the first structure is acknowledged as an underlying cause not for itself, but for a *ḥukm* in the structure of the *aḥkām* facing it. Once the attribute is acknowledged for a corresponding *ḥukm*, the *ḥukm* can be transferred to a new case exhibiting the same attribute in a similar pattern. A brief explanation of this has preceded earlier.

Types of analogy

Al-Ghazālī considers two levels of these attributes and the *aḥkām* to explain the difference between the *munāsib* that is *mu'aththir* and the *munāsib* that is *mulā'im*. He says that when the *'ayn* (specific case) of the attribute is acknowledged by the law in the *'ayn* (specific case) of the *ḥukm*, the resulting analogy is called *qiyās fī ma'nā al-*

[29] Ibid. 148.

[30] Ibid. 148–51.

[31] Al-Ghazālī, *al-Mustaṣfā*, ii, 320–21.

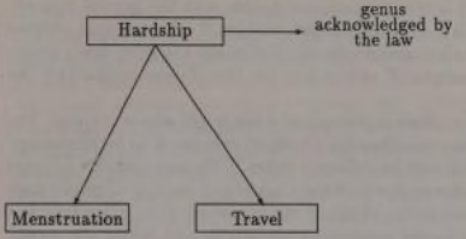
aṣl,[32] or extension included in the implied meaning of the text.[33] We may recall that this is the type of analogy declared permissible by al-Shāfi'ī. This is the case where analogy shades into literal extension of the meaning, like the association of *nabīdh* (mead) with *khamr* (wine) for purposes of prohibition of *shurb* (drinking), or the association of *tamr* (dry dates) with *zabīb* (raisins) for purposes of *ribā*.[34]

When the *'ayn* (specific case) of the attribute is acknowledged for the genus of the *ḥukm*, the resulting analogy is *mu'āthīr*.[35] The example for this case is the preference given to the brothers of the father or mother (uncles) in the case of inheritance, from which an analogy is drawn for the right to guardianship in the cases of marriages of minors. In this case *wilāyah* (guardianship) is to be passed on to those relatives who had preference in cases of inheritance.[36] Here *wilāyah* is not a specific category of inheritance, but they are gathered together through a common genus, which is proximity of kinship.

The third category of analogy is the case where the genus of the attribute has been acknowledged in a specific case of the *ḥukm*.[37] This is the case, for example, of absence of liability for delayed performance (*qaḍā'*) of prayers missed by a woman during her menstrual period, on the analogy of the permission to miss two out of four *rak'ahs* of prayer during travel.[38] Now the immediate *'illah* in the latter case is travel (*safar*). Hoever, we move one step up to the genus, of which travel forms a specific case. This is the attribute of hardship (*mashaqqah*). The menstruating woman is, therefore, excused from the performance of prayers that she missed due to her state of ritual impurity during menstruation. This is the case of the *mulā'im* (compatible) attribute, a case that conforms with the other propositions of the law.[39] The important thing to note about this type of compatible (*mulā'im*) attribute is that it is supported by an *aṣl mu'ayyan*, also called *shahādat al-aṣl* by al-Ghazālī.[40] The crite-

[32] Ibid. 319.
[33] Ibid.
[34] Ibid.
[35] Ibid. 318–19.
[36] Ibid. 319
[37] Ibid.
[38] Ibid.
[39] Ibid. 320.
[40] Ibid.

Figure 12.2: Acknowledgement of *Jins* in the *'Ayn*



rion for this is that the genus, the higher *'illah*, must be derivable directly from a lower category stated in the text, or be linked to it directly through a chain of genera.[41] Thus, hardship is a higher genus, in our example, but it has been derived from the attribute or *'illah* of travel (*safar*), which in itself is stated in the text. This category of *mulā'im*, whose genus has been acknowledged by the law for a specific *ḥukm*, is also supported by the *shahādat al-aṣl*: It is to be noticed here that this is a kind of reasoning from principle, a principle that is derived by the jurist from the texts. This principle is lesser in strength than the principles that are explicitly stated in the text, and which have been used by the Ḥanafites for the derivation of the law. The Ḥanafites also use derived principles.

When the genus of the *'illah* is acknowledged by the law for the genus of the *ḥukm* the problem is not so simple to understand, because the statements made by al-Ghazālī in his two works have to be reconciled. If a genus is acknowledged for a genus, he designates the category in one place as the *munāsib gharīb* and on another occasion as *istidlāl mursal* or *maṣlaḥah mursalah*.[42] This has led to considerable confusion in the writings of later jurists,[43] and it is only after prolonged thought and deliberation that one can make out what is going on. The basis for this confusion are the different uses of the term *gharīb* by al-Ghazālī. Here al-Ghazālī uses the term *munāsib gharīb* and says that it is an attribute whose genus is supported by

[41] Ibid.

[42] Ibid.

[43] See, e.g., al-Taftāzānī, *al-Talwīḥ 'alā' al-Tawḍīḥ*, ii, 566.

another genus in the law and it also has the support of *shahādat al-aṣl*,[44] that is, its *'illah* is derivable from the text.[45] The problem with this attribute is that it is not compatible with the general propositions of the law, that is, it is not *mulā'im*.[46] This becomes obvious when the case is examined closely. Al-Ghazālī has given many examples of this category,[47] and we may use two of these to illustrate the point.

The first example is the case of a minor girl who is married. The issue is whether guardianship (*wilāyah*) over her is to be terminated and her wealth is to be delivered to her.[48] We may compare her case to the married woman who is not a minor and say that since marriage and experience in the affairs of the household bring discretion and maturity, we should terminate guardianship and deliver the wealth of the married minor girl to her. This conclusion appears to be supported by the verse of the Qur'ān, "Prove orphans till they reach the marriageable age (or are married); then, if ye find them of sound judgment, deliver unto them their fortune."[49] This is the text that provides the *shahādat al-aṣl*. The genus that supports her is found in a tradition of the Prophet, which implies that the married woman has a right to give her own consent.[50] This pertains to marriage, but corresponds through its genus with the case of *wilāyah* in the case of wealth.[51] This attribute appears to be compatible (*mulā'im*), but a closer examination reveals that it is not. The general proposition of the law is that all minors will be subject to the *ḥukm* of *wilāyah*. This is what makes this issue *gharīb*,[52] even though its genus is affirmed by another genus and there is support for it from an *aṣl*.

The second case is that of the four types of food mentioned in the tradition of *ribā*.[53] Al-Ghazālī says that exchange is permitted in these foods with three conditions of similarity, immediate possession,

[44] Al-Ghazālī, *Shifā' al-Ghalīl*, 151.

[45] Ibid. 151, 189.

[46] Ibid.

[47] Ibid. 149–56.

[48] Ibid. 150.

[49] Qur'ān 4 : 6.

[50] Al-Ghazālī, *Shifā'*, 154.

[51] Ibid. 150.

[52] Ibid. 153.

[53] Ibid. 151, 154.

and absence of delay.[54] However, we may determine the *'illah* to be food. We are led to this conclusion due to the importance of food for human beings.[55] Uncontrolled trading in it may lead to artificial shortages posing hardship for the common man, and eventually cause social problems. The *aṣl* supporting this is the tradition of the Prophet, which requires that food is not to be sold for food except with equal measure, immediate exchange, and absence of delay on both sides.[56] A different genus appears to have been acknowledged in the same way in the law. This is the permission for sexual intercourse through marriage, which has also been permitted with three conditions: dower, *wilāyah*, and witnesses.[57] An uncontrolled permission of sexual activity is likely to lead to social problems, as in the case of food. A closer examination of the problem reveals that the issue is not supported by the general propositions of the law,[58] which not only permit transaction in all other kinds of important foods, but also freedom of contract and the right to dispose of one's wealth as against the latter case, because free sexual activity is not permitted. The attribute is, therefore, not *mulā'im* and is classified as *gharīb*.[59]

This does not mean that the *munāsib gharīb* is not permitted as a method of reasoning. It is permitted in al-Ghazālī's view though it is weak as compared to other forms of legal reasoning.[60]

The case of the *istidlāl mursal* or *maṣlaḥah mursalah* is different from the *munāsib gharīb* described above. In this case also a genus of the attribute is acknowledged for the genus of the *ḥukm*.[61] However, what distinguishes it from the *munāsib gharīb* is that it is not supported by the *shahādat al-aṣl*, that is, its *'illah* is not derivable directly from the lower level of the evidences. Further, as against the *gharīb*, it is compatible with the general propositions of the law.[62] Thus, the hold of the lower categories is released, let go, to rest in the higher genera. Two separate cases of the genus can now be gathered

[54] Ibid. 151.

[55] Ibid.

[56] Ibid. 154.

[57] Ibid. 151–52.

[58] Ibid. 152–53.

[59] Ibid. 153.

[60] In fact, he says that the two examples can be considered as belonging to the category of the *mulā'im*. Ibid. 154, 174.

[61] Ibid. 188–89.

[62] Ibid. 189.

under one genus to give the *ḥukm*. Examples of this category shall be provided later.

It would be helpful to summarize the above discussion and list all the categories of the underlying causes that have been considered so far, and some that have not been described, to provide a comprehensive picture of the way the new theory views the underlying causes.

12.4.6. *Mu'aththir*, *munāsib*, and *mulā'im*

The majority of the underlying causes to be found in the texts seek to establish, preserve, or protect a determined purpose of the law. The methods through which these causes are discovered are first divided into two types. The first method covers the discovery of the cause from the text or *ijmā'*, there being a number of detailed ways in which the cause is indicated by the text. The other method is the derivation of the cause by the jurist from the implications of the texts and provisions of the law. It is binding upon the jurist to follow and act upon the causes determined by the text or *ijmā'*. Such causes are known as effective (*mu'aththir*) causes. If the *mu'aththir* cause seeks to establish a purpose of the law it is called *mu'aththir munāsib*, otherwise it is merely *mu'aththir*.[63] Both are equally binding.

For the derived *'illah*, the condition is that it be *munāsib*, that is, it must establish, preserve, or protect an acknowledged purpose of the law.[64] Such preservation or protection is known as *maṣlaḥah*.[65] Insofar as *maṣlaḥah*, in its literal sense, means the seeking of a benefit or the avoidance of harm, the derived *'illah* may seek to preserve benefit or avoid a harm based on pure human reason. This is pure *maṣlaḥah* and may not conform with the purposes acknowledged by the law.[66] In such a case, it cannot be called *munāsib*. A further condition for the *munāsib* is that it be *mulā'im* (compatible with the general propositions of the law).[67] If it is not compatible, it will be called *munāsib gharīb*. The *munāsib gharīb* is supported by what is called the *shahādat al-aṣl*, that is, its *'illah* is derivable directly from a text. It may, therefore, be acceptable in some cases. If the cause

[63] Ibid. 158–59.

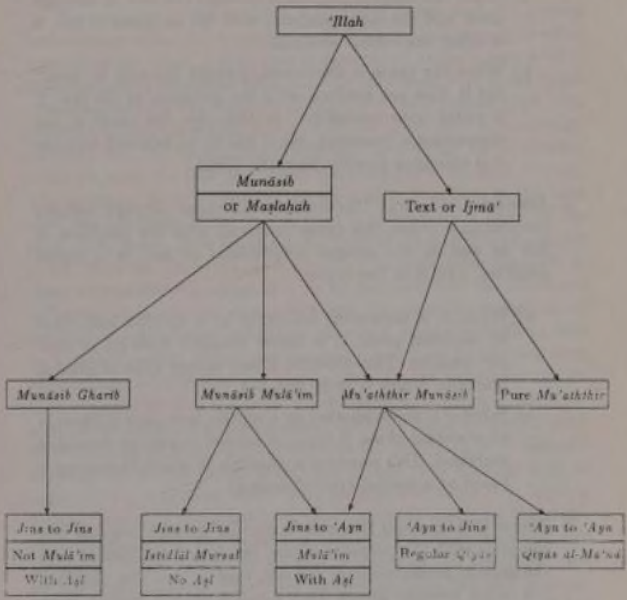
[64] Ibid. 161.

[65] Ibid.

[66] Ibid.

[67] Ibid. 189. Ṣadr al-Shari'ah, *al-Tawḍīḥ*, ii, 566.

Figure 12.3: ***Mu'aththir***, ***Munāsib***, and ***Mulā'im***



cannot be derived directly from a text in this case, it moves from the category of *munāsib gharīb* to one of pure *gharīb*. This is rejected by agreement of the jurists.[68]

For the sake of clarity we may list these cases in order of the strength of the underlying cause:

1. **First Category:** Discovery of the cause through the text or through *ijmā'*.

   a) When the cause is discovered through the text or through *ijmā'* and the cause conforms with the purposes of law, it is called *mu'aththir munāsib*.

   b) When the cause is discovered through the text or *ijmā'*, but it does not conform with the purposes of the law, it is called pure *mu'aththir*. In this case the cause is not supporting a *maṣlaḥah*, yet it has to be followed because it is emerging directly from the texts.

2. **Second Category:** Discovery of the cause through *istinbāṭ* (derivation). When this cause conforms with the purposes of law as well as the general propositions of law, it is called *mulā'im*. This is of two types:

   a) When it is supported indirectly by a specific text, that is, *shahādat al-aṣl*, it is called *munāsib mulā'im* or simply *mulā'im*. This provides a very strong type of general principle, which is to be followed.

   b) When it is not supported by a specific text, that is, there is no *shahādat al-aṣl*, it is called *istidlāl mursal* or *maṣlaḥah mursalah*. This provides a principle in which reasoning is based on a special type of analogy.

3. **Third Category:** If the cause is derived through *istinbāṭ*, and conforms with the purposes of law, but is not compatible with the general propositions of the law, that is, it is not *mulā'im*, it is called *munāsib gharīb*. Such a case is usually supported by a text, that is, *shahādat al-aṣl*. This case becomes acceptable through additional conditions stipulated by al-Ghazālī. The

[68] Al-Ghazālī, *Shifā' al-Ghalīl*, 188.

well known case of using prisoners as shields falls under this category.[69]

4. **Fourth Category:** When the cause is derived by the jurist and is conforming with the purposes of the law, but it is not compatible with the general propositions of the law, nor is it supported by a *shahādat al-aṣl*, it is a case of pure *gharīb*. This case is rejected (*mulghā*) because it is not acknowledged by the general propositions or even the texts of the *sharī'ah*.

The category of the *munāsib* that is compatible with the general propositions of the law (*mulā'im*) is divided on the basis of the effectiveness of the *'illah*. If the cause is determined at the lowest level of the structure of attributes for a *ḥukm* at the lowest level of the structure of the *aḥkām*, the resulting analogy is of the strongest type. This is known as *qiyās al-ma'nā*. It is, in fact, not considered to be analogy by some, but the implication of the text, and would be acceptable, it is said, even to those who reject the principle of *qiyās* as a whole. The attribute here is classified as *mu'aththir munāsib*. In the next case, the attribute at the lowest level is affected for a *ḥukm* at the level of the genus. This is the regular form of *qiyās* that is acceptable to all. Here too the attribute is classified as *mu'aththir munāsib*. In these two forms of analogy, it is to be assumed that the attributes indicated as causes are compatible with the general propositions of the law, for it is these attributes on which such propositions may be based. However, this is not necessary, and they do not lose their effectiveness even if they are not *mulā'im*. In the third case the attribute at the level of the genus is influenced for a *ḥukm* at the lower level of the *aḥkām*. For this attribute the name *mulā'im* itself is used. The resulting analogy is acceptable to all, according to al-Ghazālī. Some of the Ḥanafī jurists insist that though they consider it to be valid, it is not binding upon them to follow it when it is binding for the Shāfi'īs.[70] Al-Ghazālī has shown through examples that some cases designated by the Ḥanafīs as *mu'aththir* actually fall under this category.[71] This appears to be true, as some of the principles used by the Ḥanafites may have been derived by them through such attributes. This category is linked to reasoning from principle, as has

[69] This case has been considered as *istidlāl mursal* by many modern writers. It is actually a case of *munāsib gharīb*, as shall be shown below.

[70] Ṣadr al-Sharī'ah, *al-Tawḍīḥ*, 568.

[71] Al-Ghazālī, *Shifā' al-Ghalīl*, 186–87.

been stated earlier. The last category of the *munāsib mulā'im* is one in which the cause cannot be derived directly from the texts, that is, it is not supported by the *shahādat al-aṣl*, and a genus from the structure of the genera is used for establishing a *ḥukm* at the level of the genus. This is the *istidlāl mursal* or *maṣlaḥah mursalah*.

The structure of these attributes is summarized in figure 12.3. The figure does not reflect some categories mentioned and lacks some of the details.

12.4.7. The broader principle of *maṣlaḥah*

The above analysis shows that the concept of *maṣlaḥah* proposed by al-Ghazālī is much wider than the method known as *istidlāl mursal* attributed to Mālik. *Maṣlaḥah* is equated here with the *munāsib*, which means an attribute conforming with the purposes of law. We have also seen that even the attributes derived through the text or *ijmā'* can be designated as *munāsib*. The reason is obvious, because the purposes of the law themselves have been derived from these attributes, that is, the *mu'aththir* attributes. In some cases where such attributes do not conform with the *maqāṣid* they are designated as pure *mu'aththir*. The wider concept of *maṣlaḥah* and the narrower method of *istidlāl mursal*, then, stand merged in the expanded form of analogy. Al-Ghazālī, however, insists that he has not introduced anything new and these are methods of analogy that have been used by all the schools even if the names they have used for the methods are different. He gives examples from each school to prove this.

If we treat the *mu'aththir* as existing independently of the *munāsib*, the kinds of analogy accepted by al-Ghazālī are four. These are *mu'aththir*, *munāsib*, *shabah*, and *ṭard*. *Ṭard* is a method where the correspondence between the existence of the *ḥukm* with the existence of the *'illah* is used for declaring an attribute effective. This method is not very popular with the jurists. Within this, al-Ghazālī distinguishes two methods, one of which is valid and the other is not.

The validity of *qiyās al-shabah* is disputed by many jurists. However, al-Ghazālī explains that there are three methods that may be considered to be a part of the disputed *qiyās al-shabah*, but they are not; that is, they are valid. The first is the category of *qiyās al-shabah* that is declared valid by al-Shāfi'ī in *al-Risālah*. The example of determining a similarity between an animal hunted during pilgrimage and one offered as compensation for it has been mentioned earlier. The second method requires the preference of one attribute

over another, when two conflicting attributes are noticed that can independently serve as the underlying cause. The third case is where two attributes are found and the *ḥukm* is based on both. In this case, the *ḥukm* may sometimes be associated with one cause. An example is *kaffārah* (expiation), which is a worship as well as a penalty. It is only when the new case vacillates between two texts or rules, resembling one on the basis of one attribute and resembling the other on the basis of two attributes, when none of these attributes serves as a valid underlying cause, that the case can truly be designated as *shabah*. In this case the interest (*maṣlaḥah*) being served is not clear, and the decision depends upon the judgment of the *mujtahid*, as to where he finds greater resemblance (*shabah*).

12.4.8. The purposes of Islamic law

The purposes of law are divided by al-Ghazālī into two types: *dīnī* or purposes of the Hereafter and *dunyawī* or purposes pertaining to this world.[72] Each of these is divisible into *taḥṣīl* or securing of the interest and *ibqā'* or preservation of the interest.[73] *Taḥṣīl* may be viewed as securing of a benefit (*manfa'ah*) and *ibqā'* as the repelling of harm (*maḍarrah*).[74] The phrase *ri'āyat al-maqāṣid* (preservation of the *maqāṣid*) is used to indicate both *taḥṣīl* and *ibqā'*.[75] *Manfa'ah* and *maḍarrah* here do not depend on human reason, but are what the Lawgiver has considered to be benefit and harm.[76] Al-Ghazālī, therefore, says:

> As for *maslaḥah*, it is essentially an expression for the acquisition of *manfa'ah* (benefit) or the repulsion of *maḍarrah* (injury, harm), but that is not what we mean by it, because acquisition of *manfa'ah* and the repulsion of *maḍarrah* represent human goals, that is, the welfare of humans through the attainment of these goals. What we mean by *maṣlaḥah*, however, is *the preservation of the ends of the shar'*.[77]

It is for this reason that the term "utility," insofar as it introduces utilitarian concepts, based on the ideas of such thinkers as

[72] Ibid. 159.

[73] Ibid.

[74] Ibid.

[75] Ibid.

[76] Ibid. 160.

[77] Al-Ghazālī, *al-Mustaṣfā min 'Ilm al-Uṣūl*, Baghdad, 1294 (A.H.), i, 286.

Jeremy Bentham, is being avoided here on purpose. A comparison of *maṣlaḥah* with the concept of utility is not the purpose of this discussion. Further, it is likely to confuse the issue by shifting the focus from what al-Ghazālī is saying.

The worldly purposes (*dunyawī*) are further divided into four types: the preservation of *nafs* (life), the preservation of *nasl* (progeny), the preservation of *'aql* (intellect), and the preservation of *māl* (wealth).[78] When all types are taken together, we have five ultimate purposes of the law: *dīn* (religion), life, progeny, intellect, and wealth. These five purposes are designated as *ḍarūrāt* (necessities) and are the primary purposes of the law. These are followed by the *ḥājāt* (needs), which are additional purposes required by the primary purposes, even though the primary purposes would not be lost without them. The third category is that of purposes that seek to establish ease and facility (*tawassu'* and *taysīr*) in the law.[79]

Crucial to understanding the nature of these purposes of the law is the point that to each category is related a large set of purposes that supplement the ultimate purposes. Thus, the *ḍarūrāt* are supported by a number of purposes that complete them and lend support. Al-Ghazālī has not used a specific term for them and we may call them the supplementary purposes. The same is the case with the *ḥājāt*; there are purposes that support the *ḥājāt* themselves. These supplementary attributes or principles are, to use al-Ghazālī's expression, attached to the "tails" of the two main categories of the *ḍarūrāt* and the *ḥājāt*.[80] The third category of *taysīr* and *tawassu'* also has such supporting values. These are called the *taḥsīnāt* (complementary values). These details are provided by al-Ghazālī in his earlier work *Shifā' al-Ghalīl*.[81] In his later work that dealt with *uṣūl al-fiqh* as a whole, he has omitted some of these details or has stated them very briefly. It appears that following this later work some of the jurists, who followed al-Ghazālī, also ignored these details. The modern writers dealing with *maṣlaḥah* have followed suit. The essence of al-Ghazālī's theory is in the detail, which reveals certain dimensions of the theory not visible in the later work.

The examples provided by al-Ghazālī for these supplementary purposes show that a major part of the law is covered by these sup-

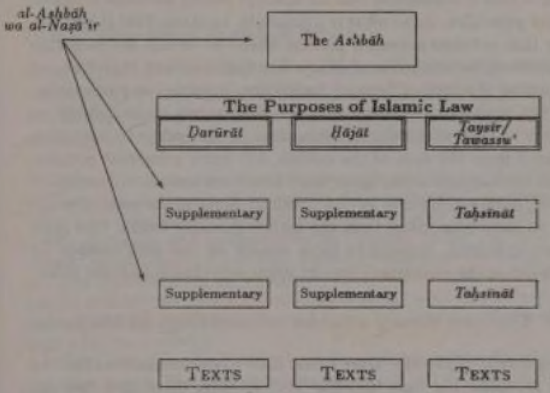
[78] Ibid. 161.

[79] Ibid.

[80] Ibid. 162.

[81] Ibid. 172.

Figure 12.4: The Purposes of Islamic Law



porting purposes. For the jurist these are important, because they determine his methodology and govern his reasoning. To understand the relationship of the different types of purposes with each other, they have to be seen in the framework of the usual structure of the categories and genera. At the bottom are the *mu'aththir* attributes or the texts themselves. Moving up we go through a large chain of the categories and genera of the *mulā'im*. These serve as the intermediate goals for the ultimate values, and finally we reach the primary goals. It would be incorrect to conceive this structure in two-dimensional terms, because al-Ghazālī emphasizes more than once that there are different levels or dimensions of the particular and the general within this structure. Nevertheless, a partial picture is attempted in figure 12.4.

If we move beyond the ultimate values recognized as the purposes of the law, we reach the area of weaker attributes, which are also used by the jurists for extending the law. This is the area of the *ashbāh*. These too are organized in the form of the particular and the general.

Al-Ghazālī maintained that the total number of attributes related to the purposes of the law is beyond human reckoning, and if a jurist were to attempt to count them and to gather them under

general rules or principles, he would be tormenting himself with an impossible task.[82] His teacher al-Juwaynī, on the other hand, had issued a kind of a directive that an attempt should be made to frame general principles. As to what is a principle, he states that it is something that presents a general picture when the details are forgotten or cannot all be retained in memory. The Shāfi'ī jurists, therefore, set themselves the task of framing such rules, maxims, and principles. This led to the development of a new field known as *al-Ashbāh wa al-Naẓā'ir*. Most of the attributes in these books appear to have been gathered from the area of the *ashbāh*, but some principles pertaining to the supplementary goals have also been stated. A conclusive answer, however, requires further research. Some of the principles appear to have been taken from the earlier Ḥanafite works. One later writer, al-Sulamī, appears to focus mainly on the area covered by *maṣlaḥah* or the *munāsib*. Thus, he refers everything to these goals.

12.5. The new theory and the methodology of the jurist

In the details of the new theory that have been discussed so far, the main argument has been that the jurist or judge deciding a case can use the method of *munāsabah* for discovering the law. The *munāsib* has been equated with the wider concept of *maṣlaḥah*. Within this wider concept there are two main methods by which the judge can extend the law. The first is the *munāsib mu'aththir*, which is divided further into *qiyās al-ma'nā* and *qiyās al-'illah*. These categories of *qiyās* are accepted and used by all the schools and jurists, and they do not represent the new element in the theory.

The second method is that of the *munāsib mulā'im*. This is also divisible into two further methods. The first of these is the *mulā'im* and the second is the *istidlāl mursal*. These two methods represent the new element in the theory. However, they are not new in the sense that al-Ghazālī has invented them. He has shown through a large number of examples that the jurists before him, including the Companions of the Prophet, had used methods that could easily be classified under these two principles. What al-Ghazālī has done is to express them systematically in terms of the methodology of *qiyās*. The *mulā'im*, he has shown, has been used extensively and is acceptable to all those who accept analogy. This is the major method underlying the new theory. There is some hesitation, al-Ghazālī says

[82] Al-Ghazālī, *al-Mustaṣfā*, ii, 321.

about accepting the method known as *istidlāl mursal* or *maṣlaḥah mursalah*. He points out that this was acceptable to Mālik, but al-Shāfi'ī was hesitant.

12.5.1. The theory in simple terms

After all that has been said, it would be helpful to state the new methodology described by al-Ghazālī in simple terms, in terms that we can easily understand, that is, somewhat detached from the terminology of the jurists. An explanation is attempted below.

The method of munāsabah *advocates reasoning from general principles of Islamic law. In the case of the* mulā'im, *the principle has been derived directly from the texts. Such a principle is consistent with the general propositions of the law and conforms with its purposes. In the case of* istidlāl mursal, *the principle has not been derived directly from the texts, but is one that conforms with the purposes of the law and is consistent with its general propositions. Such a principle has to satisfy some further conditions indicated by al-Ghazālī (these are to follow). This is what can be gathered from what has preceded.*

What remains to be shown is that the principle derived directly from the texts, that is, the mulā'im *principle, operates not only at the level of the general propositions of the law, but also at the level of principles of policy and even moral norms. On the other hand, the principle not derived directly from the texts, that is, the* mursal *principle operates only at the level of the general propositions of the law.*

What, then, has analogy to do with all this? The answer is that analogy is undertaken when we have two cases falling under two separate, yet related, principles. One of these cases bears a ḥukm, *while the other case needs it. To pass the* ḥukm *from one to the other, we derive a new principle, which incorporates the two principles that govern the cases separately. In other words, the two principles are subsumed under this new principle. The* ḥukm *from the case under one lower principle is passed to the case under the other lower principle, with the help of the connecting higher principle. This shall be clear in what follows.*

To understand and support this simplified version of the theory, we will first show how the structures described above appear, in al-Ghazālī's view, to the judge or jurist investigating a new case.

12.5.2. General propositions, principles of policy, and moral norms

We have seen that al-Ghazālī divided the purposes of the law, or its ultimate general propositions, into three main categories. These are designated as the *ḍarūrāt*, *ḥājāt*, and *tawassu' wa taysīr*. We have also seen that each of these categories is accompanied by supplementary purposes. The complementary values or purposes accompanying *tawassu' wa taysīr* are called *taḥsīnāt* by al-Ghazālī. On occasions he refers to the entire category as *taḥsīnāt*. As long as the detail has been indicated we may also refer to the third category as *taḥsīnāt*. After describing these categories and their grades, al-Ghazālī looks at them from a different level.

He says that the *munāsib* is divided into two main categories. These are the *ḥaqīqī 'aqlī* and the *khiyālī iqnā'ī*. We may designate these respectively as concrete propositions and convincing norms. The criterion for judging them is that the more we investigate the attributes falling under the *ḥaqīqī 'aqlī* the greater the conviction that these are concrete propositions and a suitable (*munāsib*) source for the law, while the *khiyālī iqnā'ī*, when subjected to investigation, start losing their force and are reduced to mere ethical and moral norms. Included in the *ḥaqīqī 'aqlī* are the *ḍarūrāt* and the *ḥājāt*. These include the concrete propositions of the law. The *khiyālī iqnā'ī* include all the *taḥsīnāt*, which means the complementary ethical and moral norms.

Can a judge derive a principle saying that it conforms with the concrete propositions or with the ethical and moral norms, and proceed to base his legal decision on such a principle? The answer is in the affirmative, but there are other conditions. In his earlier work, *Shifā' al-Ghalīl*, al-Ghazālī said that the principle conforming merely with the *taḥsīnāt* or the ethical and moral norms cannot be used, unless it has been derived from the texts. In the case of the *ḥaqīqī 'aqlī*, a principle that has not been derived directly from the texts can be used if it conforms with the *ḍarūrāt* and the *ḥājāt* or with their supplementary purposes, provided a few conditions are met, as shall be shown later. In his later work, al-Ghazālī excludes the *ḥājāt* from this concession. He maintains that even in the case of the *ḥājāt* the principle must be derived directly from the texts. The only case left, then, is that of the *ḍarūrāt* in which a principle not derived directly from the texts, but conforming with the *ḍarūrāt*, can be used by the judge for his reasoning and decision.

This shows that there are three things to which a judge may refer in his reasoning. The first are the ultimate general propositions of the law or the *ḍarūrāt*. The second level is that of the *ḥājāt*. These become law only when they are supported by an *aṣl* or text, that is, the principle based on the *ḥājāt* must have been derived from the texts. In this sense, they are more like principles of policy indicating what is recommended and what is not. The third level is that of the convincing (*iqnā'ī*) norms, that is, the area of the *taḥsīnāt*, the ethical and moral values. These can be used only when such norms have been acknowledged by the texts, that is, they are supported by an *aṣl*, as in the case of the *ḥājāt*. The judge in his reasoning, we may therefore say, refers to the *maqāṣid*, which consist of general propositions, the principles of policy, and the moral norms, in that order of priority. THE LAW IS DERIVED THROUGH AN INTERPLAY BETWEEN THE GENERAL PRINCIPLES ON THE ONE HAND AND THE *maqāṣid al-shari'ah* ON THE OTHER.

It would be helpful to refer briefly to modern law at this stage to indicate the similarity between the modes of reasoning of judges, whatever the legal system. Melvin Eisenberg, in his book *The Nature of the Common Law*, after referring to some modern analyses of law, states:

> I will show that none of these analyses properly accounts for common law adjudication. Under the institutional principles that govern the common law, social propositions are relevant in all cases. To put this differently, all common law cases are decided under a unified methodology, and under this methodology social propositions always figure in determining the rules the courts establish and the way in which those rules are extended, restricted, and applied. Easy cases are not cases that are controlled by specific doctrinal rules, but cases in which a relevant doctrinal rule is supported by applicable social propositions.
>
> ...[T]he judge is not free ...to employ those social propositions he thinks best, or to establish those rules he thinks best, on the basis of his own moral and political convictions. Rather, the judge is under an obligation to employ only those social propositions that satisfy certain criteria, and to establish only those rules that are generated by the application of the institutional principles of adjudication.[83]

[83] Eisenberg, *The Nature of the Common Law*, 2–3.

Eisenberg deals at length with what are the main social propositions that a judge takes into consideration. These propositions relate to "moral norms, principles of policy, and experiential propositions,"[84] and experiential propositions are "propositions about the way the world works."[85] This is not all as "[m]ost modern analyses of law and adjudication can largely be defined in terms of their treatment of the interplay between doctrinal propositions and social propositions."[86] Doctrinal propositions "purport to state legal rules and are found in or are easily derived from textual sources that are generally taken to express legal doctrine."[87]

12.5.3. The new theory and the principles employed

General principles have occupied a prominent place so far in the discussions, not only in this chapter, but also in the preceding chapter. Principles are mainly of three types. First come principles that are stated explicitly in the texts. These are like the principle about the prohibition of *ribā* emerging from a Qur'ānic text, as well as its supplementary principles stated in the traditions. This was discussed in the methodology of the Ḥanafites in the previous chapter. Another example from the traditions is that "eligibility for profit is based on a corresponding liability for bearing loss."[88] These principles can be termed as the *mu'aththir munāsib* principles, because they are stated in the texts and the underlying causes assimilated under them conform with the purposes of the law. It will be remembered that even if these principles do not conform with the purposes of the law, they are still effective (*mu'aththir*), because they have been explicitly mentioned in the texts. The number of principles stated explicitly in the texts are many, but limited nevertheless.

The second category of principles are derived principles. This category of principles has been called *mulā'im* by al-Ghazālī. The *mulā'im* is a principle that has been derived directly from the texts. In a hypothetical example discussed earlier, we saw that the underlying cause of "minority" was generalized to yield the category of

[84] Ibid. 14.

[85] Ibid. 37.

[86] Ibid. 2.

[87] Ibid. 1.

[88] *Al-kharāju bi al-ḍamān.*

"inability (*'ajz*)."[89] This was further generalized to yield the principle of "necessity (*ḍarūrah*)." These generalized categories are no longer specific underlying causes, but are flexible general principles. In fact, the determination of the *'illah* itself is a kind of generalization. This was seen earlier while distinguishing *qiyas al-ma'nā* from *qiyās al-'illah*. *Qiyās al-ma'nā* is the generalization of a specific (*khāṣṣ*) word through literal extension. The cases, besides the one specifically mentioned in the text, are said to be included in the meaning of the text. The specific word is now acting as a general word. In *qiyās al-'illah* generalization is not possible through literal extension, but is achieved by determining an underlying cause, which acts like a genus for all the cases to which the *ḥukm* will be extended. Thus, if the text says that the minor boy is to be subjected to the *ḥukm* of *wilāyah*, the underlying cause of minority will have to be determined to extend the *ḥukm* to a minor girl, married or unmarried. The genus of minority covers all these persons now with respect to the *ḥukm* of *wilāyah*, because it stands generalized. There are two characteristics in this determined *'illah* that are not found if the generalization is extended to a higher genus. The first is that the *'illah* is always something mentioned in or indicated by the text. The attribute discovered thus is usually a stable cause that does not waiver with time, place, or persons. The second characteristic is that the generalization involves a single level of generalization. This is what makes the *'illah* more like a rule than a general principle. These are the characteristics of what we have been calling strict analogy.

The characteristics of the derived principle called *mulā'im* differ from those of the *'illah* on both counts. Thus, it generalizes the rule at a higher level than that of the *'illah*. For example, it recognizes that "minority" is not the true reason for extending the *ḥukm* of *wilāyah*, it is, in fact, the inability of the minor to give a legally valid consent. It, therefore, moves one level up and determines "inability to consent" to be the cause. This brings us to the second attribute. The generalization at this level is based on the *ḥikmah* (wisdom) behind the text. The relationship between the *'illah* and the *mulā'im* related to it is that the *mulā'im* provides an explanation for the *'illah*. The attribute of inability to consent is, therefore, a kind of explanation for the *'illah* of minority. Such a cause is avoided in strict analogy because it is not very stable for certain cases. For example, if the cause of inability permits us to extend the *ḥukm* of *wilāyah* to the

[89] See Ṣadr al-Shari'ah, *al-Tawḍīḥ*, ii, 572.

ma'tūh or a somewhat retarded person, who is not a minor, the cause may not hold true for all such persons, depending on the intensity of the handicap. If the cause is generalized at a still higher level, we arrive at the attribute of "necessity,"[90] and this enables us to extend the *ḥukm* to the *safih* (prodigal, spendthrift). When this person is not a minor, there might be some injustice involved if he is not allowed to do what he likes with his fortune. It is for this reason that Abū Ḥanīfah does not permit the application of this rule beyond the age of twenty-five. The derived principle may, therefore, require the jurist to focus on the result of his *ijtihād*, and not on the derivation of the correct cause alone.

What, then, is the relationship between the specific rule, that is, the *'illah* and the general principle that is based on the *ḥikmah* (wisdom). Perhaps an explanation from modern law about the relationship between general principles and specific rules would be more helpful here. Melvin Eisenberg says:

> When principles and rules are conceived in this way, principles may seem as explanations for rules, in the sense that we commonly invoke general propositions to explain those that are more specific. However, the force of principles is not merely explanatory. Principles, like rules, are binding legal standards, and often determine results without the mediation of rules.[91]

In exactly the same way the principles based on *ḥikmah* are considered as binding law, and not mere explanations, in al-Ghazālī's theory. Further, they have always determined results without the mediation or rules in the Ḥanafite system of interpretation.

In developing his theory of the purposes of law, al-Ghazālī first shows that the higher levels of generalization of the cause have been used by schools and individual jurists. This is acknowledged by Ṣadr al-Sharī'ah for the Ḥanafites. What, then, is the new element in al-Ghazālī's theory? He insists that such generalized rules can be applied only if they meet two conditions. Perhaps, it is implied that these conditions will make an unstable cause based on the *ḥikmah* more stable and in tune with the rest of the law. The first condition is that these principles should conform with the purposes of the law, that is, they should be *munāsib*. Second, they should not clash with

[90] Ibid. 573.

[91] Eisenberg, *The Nature of the Common Law*, 77.

the general practices of the law, that is, they should be consistent with the rest of the law. This is the principle known as *mulā'im* in al-Ghazālī's terminology. This shows that al-Ghazālī, in fact, restricts the uncontrolled use of the *ḥikmah* for the derivation of the principle, by stipulating the conditions of *munāsabah* and *mulā'amah*.

We have said that the Ḥanafites have been using such principles from the beginning, and that this has been acknowledged by Ṣadr al-Sharī'ah. Al-Ghazālī shows through examples that the Ḥanafites have been using the *mulā'im* principle all along, but have been calling it *mu'aththir*.[92] The Ḥanafites, like all jurists who employ general legal principles, used these principles in two ways. The first is reasoning from principle in which a case is considered as falling within the ambit of the general principle. This is recognized indirectly by al-Ghazālī. He describes a case related from Abū Ḥanīfah and remarks that it is not based on analogy, but on the assimilation of the particular under the general—*dukhūl al-tafṣīl taḥt al-jumlah*.[93] He then proceeds to show how the proposition is constructed and the conclusion drawn. The other way these principles were employed was through analogy. This method forms the foundation of al-Ghazālī's theory.

The third type of principle is the *mursal*. This principle is not derived from the texts, but seeks its authenticity through *munāsabah* and *mulā'amah*, that is, it conforms with the purposes of the law and is consistent with the rest of the law. These conditions are expressed by al-Ghazālī in a different way for considering a number of cases that he uses as examples. The examples given by al-Ghazālī can easily be mistaken for examples of this principle, the *istidlāl mursal*. However, most of these are examples of the *gharīb* that lies on the margin of the proper *istidlāl mursal* and the pure *gharīb*, a principle not acknowledged by the Islamic law. He rejects most of them. The conditions that he rephrases for showing how the *mursal* principle falls under the approved category are:

- It should not be *gharīb*
- It should not clash with the *naṣṣ* (text)

[92] The basis for this appears to be the wider concept of literal interpretation in the Ḥanafite system known as *dalālat al-naṣṣ*, which renders the derived genus here as having been implied by the text rather than being derived. Exploring this idea further would unnecessarily prolong the discussion. For this method of interpretation see Baḥr al-'Ulūm, *Fawātiḥ al-Raḥamūt*, on the margin of *al-Mustaṣfā*, ii, 293-94.

[93] Al-Ghazālī, *Shifā'*, 186-87

- It should not attempt to alter the implications of the texts, that is, the general propositions and the principles of the law.

The effects of these conditions can be seen better under the discussion of analogy by the use of these principles, because al-Ghazālī was focusing on analogy rather than the assimilation of particular cases under the general proposition.

12.5.4. The new theory and analogy

Before attempting to explain how analogy really works within the theory of *munāsabah*, it would be helpful to refer to one type of analogy undertaken in the common law. The reader is invited to note the similarity between the reasoning of Muslim jurists and the modern judge. Defining this mode of analogy in the law, which is designated as "consistent extension," Eisenberg says:

> One mode of reasoning by analogy is as follows: A precedent court has announced rule r, which in terms covers matter X. The deciding court is now faced with a case that concerns matter Y. Matter Y does not fall within the stated ambit of rule r. Since matters X and Y are not identical, treating them differently might be consistent as a matter of formal logic. However, the deciding court determines that treating matters X and Y differently would be inconsistent as a matter of adjuditative reasoning, because neither applicable social propositions nor a deep doctrinal distinction justifies different treatment of the two cases. In effect, the deciding court determines that the statement of the announced rule in the relatively narrow form r, rather than in the relatively general form R, was or has become adventitious. . . . [T]he deciding court concludes that the rule r, which covers only matter X, should now be deemed only a special case of the rule R, which covers both matters X and Y. It therefore reformulates the announced rule by generalizing it and decides the case at hand accordingly.[94]

This is exactly the form of analogy that has been described in the examples that have preceded. To recall our hypothetical example, the *ḥukm* of *wilāyah* applies to minors. This does not cover the insane person, who is not a minor. A general rule is formulated that is based

[94] Eisenberg, *Nature of Common Law*, 87–88.

on the inability to consent. The rule about minority now becomes a special case of the generalized rule of "inability." The *ḥukm* of *wilāyah* can now be extended to the insane person.

This form of analogy is undertaken in relation to the *mulā'im* as well as the *istidlāl mursal*. We shall focus on the *istidlāl mursal* through examples given by al-Ghazālī. The first example shall be considered to show how analogy is undertaken within the framework of the purposes of the law. The second example will be discussed because it has been misread by some later jurists. This example appears to have caused some confusion in understanding the meaning of *maṣlaḥah mursalah*. It is actually an example of the *gharīb*, and al-Ghazālī's purpose is apparently to show how such a case can be justified on the basis of additional conditions.

First example of analogy—*istidlāl mursal*

The first example is that of the *istidlāl mursal* proper, which satisfies the three additional conditions stipulated by al-Ghazālī, and that were listed in the previous section. These conditions are that the *munāsib* should not be *gharīb*, it should not conflict with a text, and it should not attempt to alter the implications of the text. The case that follows is well known, and the reader may already be acquainted with it. The purpose, however, is not to point out the case, but to show how analogy is undertaken by generalizing the principle.

The case was decided by 'Alī the cousin and son-in-law of the Prophet. The drinking of wine is prohibited by the texts, however, no fixed penalty is prescribed. The penalties that appear in the traditions vary and are not fixed. He is reported to have said:

> He who drinks is intoxicated; he who is intoxicated raves; he who raves slanders; I (therefore) uphold the penalty of the slanderer for him.

This, according to al-Ghazālī, is based on the form of analogy known as *istidlāl mursal* or *maṣlaḥah mursalah*, because the principle in the above statement is not mentioned in the texts, nor can it be derived from a specific rule. The principle under which the penalty of slander *qadhf* is covered is that the "person who slanders is to be awarded the penalty of *qadhf* (slander)." This is explicitly mentioned in the Qur'ān, and the penalty is eighty stripes. Al-Ghazālī says that this principle is *munāsib*, that is, it conforms with the purposes of the law. However, if we attempt to apply it to the case of the person

who drinks, it does not appear to be *mulā'im* (compatible) with the general practices of the law. The reason is that it would amount to giving him a penalty for an offense that he did not commit; namely, *qadhf*. Al-Ghazālī maintains that when probed deeply we find it to be *mulā'im*. The law, he says, often assigns the outward indication (*maẓinnah*)[95] of a thing the *ḥukm* of the underlying intended act or happening. Thus, penetration is considered to stand in place of actual ejaculation for purposes of bathing to achieve ritual purification; *bulūgh* (the age of puberty), the outward indication of of discretion and maturity, is assigned the *ḥukm* of actual discretion to determine majority; sleep is assigned the *ḥukm* of ritual impurity, because one who sleeps usually becomes ritually impure due to various reasons. In such cases, the reasoning would be: he who sleeps becomes ritually impure; he who becomes ritually impure performs ablution; therefore, he who sleeps is to perform ablution (for the next prayer). This is the same as saying: he who drinks is intoxicated; he who is intoxicated raves; he who raves slanders; therefore, he who drinks is to be awarded the penalty for slander. This reasoning leads to the conclusion that drinking of *khamr* is the outward indication of the loss of one's senses that leads to slander and finally to enmity and hatred. As a punishment for slander has been provided by the texts, it should be awarded for drinking wine, which is its outward indication.

The preceding reasoning indicates how a new, and much wider, principle is formulated. THE PRINCIPLE UNDER WHICH THE PENALTY FOR SLANDER IS AWARDED IS NOW A SPECIAL CASE OF THIS GENERALIZED PRINCIPLE, AS IN THE EXAMPLE QUOTED FROM THE LAW TWO PAGES BACK. This general principle is contained in the statement attributed to the fourth Caliph. The larger principle now includes both cases of *qadhf* (slander) and *shurb* (drinking). Further, we notice that this case meets all three conditions prescribed by al-Ghazālī, that is, it is not *gharīb*, it does not conflict with an explicit text, and it does not alter the implications of the general propositions of law. The case, then, falls within the principle of *maṣlaḥah mursalah* proper.

Second example of analogy—*gharīb*

The second example is being stated here to show the operation of the three conditions stipulated by al-Ghazālī, as well as further conditions on the basis of which a case that appears to be based on

[95] In the literal sense, it would be the outward location of the *ḥukm*.

the *mursal* principle, but which is actually *gharīb*, may be accepted. The case is purely hypothetical. It is the well-known example of the enemy attacking Muslims and using Muslim captives as shields. The example appears in al-Ghazālī's later work where he has stated the whole theory very briefly. This has caused some confusion in the work of the later jurists, especially Ṣadr al-Sharī'ah, who does not take into account the various ways al-Ghazālī uses the term *gharīb*. Al-Ghazālī designates anything that is not *munāsib* or is not *mulā'im* as *gharīb*. He does not call the *istidlāl mursal* as *gharīb* because it is both *munāsib* and *mulā'im*, as has been shown in the previous sections. The *gharīb* principle may be a *gharīb* that is not *munāsib*, or it may be a *gharīb* that is *munāsib*, though not *mulā'im*, but is supported by an *aṣl* (text), or it may be a *gharīb*, that is, *munāsib*, but is neither *mulā'im* nor is it supported by an *aṣl*. The present case resembles the last category. Al-Ghazālī himself calls it *gharīb*. The present case may be called *mursal gharīb* because it is not supported by a text and is also inconsistent with the rest of the law, that is, it is not *mulā'im*. As compared to this, the *istidlāl mursal* is based on the *mursal mulā'im*, as in the previous example. THIS CASE, THEREFORE, VIOLATES ALL THREE CONDITIONS THAT AL-GHAZĀLĪ HAS STIPULATED for *maṣlaḥah mursalah*. First, it conflicts with the texts that clearly lay down that no one is to be killed intentionally. Second, it violates the general propositions of the law, which prescribe that only those persons can be killed who have committed an offense. It is, therefore, not *mulā'im*, which means it is *gharīb* or unacknowledged by the law. By permitting the killing of Muslims under certain circumstances due to necessity, it attempts to alter the meaning of the implications of the texts, which is the third condition stipulated by al-Ghazālī.

Al-Ghazālī appears to be saying, although he does not say it explicitly, that even such a case may be drawn into the fold of the *istidlāl mursal*, which is *mulā'im*, but with additional conditions. These conditions are that the case should lie in the area of the *ḍarūrat* (necessities), it should be definitive (*qaṭ'ī*), and it should be general (*kullī*). This hypothetical case assumes that the entire Muslim community is being attacked at once. If the entire community is destroyed or eliminated, Islam as a religion will disappear. Thus, this case lies in the area of the *ḍarūrāt*, as it affects the first primary purpose of the law, that is, the preservation and protection of *dīn*. The second assumption is that we are certain that if we shoot at the disbelievers, who are using the Muslim captives as shields, they will be driven away and the Muslims, at least some of them, will be saved. This

certainty about survival makes the case definitive (*qaṭ'ī*). The third assumption is the same as the first that the entire Muslim community is being attacked. Thus, there is the interest of a few Muslims pitted against the community as a whole, and the latter is to be preferred.

With these three conditions, then, this *mursal gharīb* may be accepted. Some other cases that are *gharīb* like this case, for example, persons in a boat who are cast out at sea kill one companion by drawing lots are rejected by al-Ghazālī. These cases do not affect the existence of the entire community.

In any case, this case bothers those who consider *maṣlaḥah mursalah* to be the major breakthrough made by al-Ghazālī, and who consider this case to fall in the category of the regular *istidlāl mursal*, when it does not. In my view, this is incorrect. The major strength of al-Ghazālī's theory lies in using the *mulā'im*. In fact, it is incorrect to use the term *maṣlaḥah*, which is a wider concept, to mean *maṣlaḥah mursalah*. *Maṣlaḥah mursalah* is a minor concept within the larger concept. The larger concept establishes an organic relationship between the principles of the law, its purposes, and reasoning by analogy.

In the law too reasoning from principles is closely linked to reasoning by analogy, which is incorporated within the larger methodology. We may conclude by quoting Melvin Eisenberg again:

> Reasoning by analogy in the common law is sometimes thought to consist simply of comparing similarities and differences between cases, or of reasoning "by example." If these conceptions were correct, reasoning by analogy would be qualitatively different from reasoning from precedent or principle, which both turn on reasoning from standards. These conceptions are, however, incorrect. Reasoning by analogy differs from reasoning from precedent and principle only in form.[96]

This is exactly what al-Ghazālī's theory shows us. It is a theory that is based on the interplay between general principles and the *maqāṣid al-sharī'ah*, which include in themselves the primary necessities, the principles of policy, and the moral norms approved by the law of Islam.

[96] Ibid. 83.

12.6. The new theory and the development of the law

In the previous chapter we had concluded that the systems of interpretation or theories of law tended to be more and more literal. Even on the basis of this conclusion, it could not be said that the law had become rigid, as is maintained by Western writers, on the basis of such literal tendencies. The reason for this was that some of these theories, especially the Ḥanafite theory, employed general principles, and it would not have been difficult through such theories to extend the *sharī'ah* law into the area that had been taken over by the state.

In this chapter, the idea of the literalist influence was explored further, by suggesting that it is a literal system of interpretation that falls back on the purposes of law and flexible ultimate values. To emphasize this point, the traditional theory, or al-Shāfi'ī's theory, was examined. It was indicated that if the rules of literal interpretation determined by al-Shāfi'ī were combined with the narrow forms of *qiyās* that he approved, it would indeed be difficult to extend the law very far beyond what is laid down in the texts. This point was further emphasized by showing that the majority of the texts used by the jurists related to the *'ibādāt* or the laws of worship and ritual. The remaining focused mainly on the personal law, like marriage, divorce, and inheritance. Finally, in this chapter, al-Ghazālī's theory was analyzed in some detail. This theory is based on the interplay of general principles and the purposes of law, and provides such flexibility for the jurist that the law based on the texts can be extended to any conceivable situation that may face the Muslim community. One significant point that emerged from this theory was the insistence of al-Ghazālī that what he had stated was nothing new. The methods elaborated by him had already been employed by the jurists before him. He only expressed them systematically and imposed some further conditions. Why, then, was the law not extended beyond what is contained in the books of the jurists?

Even if it is assumed that the earlier jurists had not used the methods proposed by al-Ghazālī, the question as to why they did not extend the law after al-Ghazālī's time is not very clear. Armed with the new theory, Muslim jurists could have extended the law to all activities, whether in the public or the private sphere, in a very short time, not to speak of five hundred years or more. After all, we do find al-Ghazālī dealing with ease with matters of taxation, the rights of the accused, and several other areas that appear to have been monopolized by the state. The jurists did not move in

this direction, and the major areas within the domain of the juri remained very much the same that they were in al-Shaybānī's worl This brings us back to the question of the two spheres of the law.

In the light of all that has been said in the previous chapters a the present, the only conclusion we can draw is that the jurists d not extend the law intentionally. Their involvement with the part the law that revolved very closely around the texts was all by desig Not only this, the literalist trend in the theories of Islamic law reflec the desire of the jurists to bring this limited area of the law clos and closer to the texts, to discover the true intention of the Lawgiv This trend began with al-Shāfi'ī and went up to the Ḥanbalī scho In the design of the legal system conceived by the jurists, they appe to have left everything that was beyond the law based directly on t texts to the ruler. To ensure that the laws made by the ruler we developed in accordance with the general principles of the *shari'a* the jurists imposed a fundamental condition: that the ruler must a *mujtahid*.

The part of the law with which the jurists were concerned h been developed by them with such thoroughness that a parallel f it cannot be found in human history, that is, excluding the mode age. It fully covers the areas that it was intended to cover, in fact, have four or more versions of it. If the ruler was assigned the du of framing laws and developing the legal system, which was outsi the jurisdiction of the jurists, then, it is the work of the ruler in ea age that is to be judged for effectiveness, and not that of the juri Did the ruler in each age establish laws and legal institutions in h own sphere of the law? Did this law conform with the dictates of t *shari'ah* or was it based on expediency and power, that is, was h legal policy (*siyāsah*) *'ādilah* (just) or was it *ẓālimah* (tyrannical)?

From another perspective, if the need for the part of the la linked closely to the texts had already been met, the new theo and the emerging purposes would not be very useful. The greate need for this theory of the purposes of the law would be for the la that fell within the jurisdiction of the ruler. Many of the exampl given by al-Ghazālī are relevant to this part of the law. As has be indicated above, the strict theory formulated by al-Shāfi'ī was n flexible enough to deal with problems that were not tied closely the texts. Al-Ghazālī, therefore, framed a theory that could hand this task with ease.

Al-Ghazālī's theory establishes a methodology for the unchart area of the law that is waiting to be developed by the Muslim stat

Chapter 13

The Refinement of the Purposes of Law

The Islamic legal system evolved gradually over the ages and reached full maturity in five centuries of its existence. A large number of theories of interpretation were formulated and practiced by jurists during this period. Out of these, we have tried to understand three main trends or theories. There were other variations of these theories, but these did not gain popularity among the jurists. The last theory developed by al-Ghazālī emphasized the importance of the purposes of law and the need to consider the texts collectively to benefit from the spirit of the law. It will not be an exaggeration to say that the *maqāṣid al-sharī'ah* became more popular with the jurists than the theory itself. Most jurists, who followed al-Ghazālī, occupied themselves with the refinement of the *maqāṣid*. Al-Ghazālī had opened a new field for them. Al-Rāzī, for example, presented a critical analysis of the *maqāṣid*, and his analysis demands a separate exhaustive study. Ṣadr al-Sharī'ah was fascinated with them and tried to asses the Ḥanafī position with respect to the *maqāṣid*, but it was the Mālikī jurist al-Shāṭibī who constructed his exhaustive study on interpretation around the *maqāṣid*. The attempts by these jurists led to further refinements in the understanding of the purposes of law and also revealed their significance for Islamic society as a whole.

Our study of legal theories will not be complete if we do not explain the significance of the *maqāṣid* for Muslim society considered collectively. The emphasis in this chapter will, therefore, be on the structure of the *maqāṣid* and how they govern the legal, political, and economic systems of the larger system known as the Muslim

community. Before this is attempted, it would be useful to assess the progress we have made in the previous chapters.

13.1. Tying the strands together

It has been shown in the previous chapters that the story of Islamic legal theory may be narrated in terms of the use of general principles and the interplay between these general principles and the purposes of Islamic law. Principles were used by the earlier jurists, the Mālikīs and the Ḥanafīs, and this led to a rapid development of the law, as is witnessed in the works of al-Shaybānī and the Mālikī jurists. The use of general principles, and the accompanying flexibility in interpretation, created an impression that the jurists were legislating on their own, that is, following *ra'y*, and that they were evading the literal implications of the texts of the Qur'ān and the *Sunnah*. This led to a movement that was reflected in the subsequent antagonism between the Ahl al-Ḥadīth and the Ahl al-Ra'y. In addition to this, the state appears to have assumed exclusive jurisdiction over certain areas of the law, by the time the Abbasids came into power. This was that part of the law that was neither mentioned explicitly in the texts nor could it be derived directly from them through the strict methods advocated later by the Ahl al-Ḥadīth. The impact of these two factors, that is, the shrinking role of the jurist and the movement of the Ahl al-Ḥadīth, was that the jurists were now confined to interpretation, and in some cases adjudication, of a part of the law that could only be discovered directly from the texts.

As the bulk of this law related to worship, personal law, and to the *ḥudūd* penalties, the interpretation required from the jurists was limited. The jurists, as well as the Ahl al-Ḥadīth, appeared now to focus more strictly on the true intention of the Lawgiver, as the larger affairs of state were no longer their responsibility. The true intention of the Lawgiver in their view, as already indicated, was to be found in the literal meaning of the texts, and flexible general principles did not have an important function to perform. To fulfill this limited role, al-Shāfi'ī framed his theory. His theory emphasized literal methods of interpretation and limited forms of analogy. The theory did not eliminate, but did restrict the use of general principles as advocated by the Ḥanafīs, especially when they clashed with the literal meaning of traditions. His theory took some time to strike roots, and over a period of two centuries, was able to provide a somewhat different version of the existing law, but it did not produce any structural

changes in the law. The role of the jurist during this time appears to have shrunk even further, as some of the discussions found in al-Shaybānī's works were no longer part of the regular manuals of law.

Two centuries after al-Shāfi'ī proposed his theory, a renewed interest in general principles is witnessed in Islamic legal theory. Surprisingly, the initiative is taken by some jurists of the Shāfi'ite school, a school whose founder was the first to prefer literal interpretation over the use of general principles. The real reason for this renewed interest is difficult to determine. It could have been political, and it could be linked to the revival of Muslim sciences as a whole, an idea that appears to be popular with al-Ghazālī. Is it possible, we may ask, that with the breakup of the Islamic empire into smaller sultanates, the jurists hoped that they would have a greater role to play in the affairs of the state and the framing of laws in the area that had up until then fallen within the jurisdiction of the ruler alone? There is no definitive reply to this question, though the *sulṭān* does loom large in the discussions found in the works of al-Juwaynī and al-Ghazālī, because most of the examples provided by al-Ghaz[illegible] deal with the law that was within the jurisdiction of the *imām*. [illegible] has already been discussed.

In any case, the first proposal for the discovery of general principles came from al-Juwaynī, as has been shown in the previous chapter. The jurists who followed him took up work, at his insistence, in two directions. The first was the recording of principles that were stated in the form of maxims. Some of these principles were derived from earlier Ḥanafī works. This area of the law may be classified under the juristic art of distinguishing cases, that is, cases that appear to fall under one principle, but are governed by a different principle. Although works on *al-Ashbāh wa al-Naẓā'ir* are more popular, the most important work in this area is *al-Furūq* by the Mālikī jurist al-Qarāfī.

The second direction, in which the jurists took up work, was that of the *maqāṣid*. This work was undertaken, and fully developed, by al-Ghazālī in the form of a theory. This theory, as described in the previous chapter, explained how general principles interacted with the purposes of law to yield a rule, and how these general principles and purposes related to the field of *al-ashbāh wa al-naẓā'ir*. Al-Ghazālī's work opened up new avenues for later jurists. Almost every writer after him discussed the *maqāṣid* within a discussion of analogy or that of *maṣlaḥah*, yet many of them were hesitant about

the derivation of law through methods proposed by him. The reason could be that these jurists were still focusing on the limited role of the jurist, while al-Ghazālī was looking ahead into the future. The purposes of law did not have a real function to perform in the limited sphere in which the jurists operated. The result was that the later discussions ignored al-Ghazālī's theory taken as a whole. These discussions focused on the *maqāṣid* in isolation.

One jurist who was fascinated by the idea of the *maqāṣid*, and who realized their importance in explaining the general posture of Muslim society and the nature of the social system, was al-Shāṭibī (d. 790/1388). He devoted a comprehensive work to the subject.[1] Al-Shāṭibī's refinements of al-Ghazālī's ideas could not be put into practice. The reason is generally attributed to *taqlīd* and the closing of the gate of *ijtihād*, but to our mind the true reason lies in the changing global scene. Muslim states had by this time lost much of their political and military power. Western nations were gaining in strength, and were gradually able to subjugate and colonize most of the Muslim world. Laws derived by the jurists continued to remain in force, at least in the area of personal law, but the laws made by Muslim rulers were abolished and were replaced by Western legal systems.

The work of Muslim jurists on legal theory and the purposes of Islamic law lay dormant for a few centuries; their evolution slowed down, but research did not come to an end. In recent decades research on Islamic law has increased giving us an opportunity to establish a link between the purposes of Islamic law and the modern world.

In this chapter, an attempt will be made to forge this link. Reliance for this purpose will be placed on al-Ghazālī's work as well as on that of al-Shāṭibī. It may be mentioned, however, that most of the ideas found in al-Shāṭibī's work are really an elaboration of al-Ghazālī's ideas. In the following pages, then, we shall try to isolate the purposes of Islamic law from the legal theory proposed by al-Ghazālī. The study of these purposes within this legal theory highlights their significance for the legal system. Isolating the *maqāṣid* from this legal theory and considering them as the goals of the whole Muslim community itself is expected to throw light on the significance of the *maqāṣid* for the social system. This is what al-Shāṭibī

[1] His other major work *al-I'tiṣām* also contains important sections on the principle of *maṣlaḥah*, along with a number of important examples that illustrate the principle.

did. The first task, therefore, is to see how the *maqāṣid* emerge from the texts. The underlying basis for this is the assumption that the Lawgiver has laid down the laws in the interest of Man. This implies that the law as well as the goals of the *sharī'ah* are always working for the interest of Man. After explaining this, we shall discuss how these interests are secured through the interaction of the *maqāṣid* in a determined order of priorities.

The jurists derived the *maqāṣid* in a highly organized structure, yet it is a relatively new field when considered within the whole span of Islamic legal history, and there may be some inconsistencies in the structure that may offer an opportunity to modern scholars for reinterpretation and further refinement. A few representative points will be discussed to indicate this. In a final section the Muslim community will be considered as a general-purpose system, a living organism, that has the *maqāṣid al-sharī'ah* as its goals. Within this section, we shall try to show that the *maqāṣid* provide an organized system of norms and values for the social, legal, political, and economic subsystems of the Muslim community. This discussion is expected to indicate the kind of community that is postulated by the *maqāṣid*, how this community maintains internal equilibrium, and how it views the rest of the world.

13.2. *Maqāṣid al-sharī'ah* and the texts

The primary goal of the *sharī'ah*, according to most jurists, is to free Man from the grip of his own whims and fancy, so that he may be the servant of Allāh by choice, just as he is one without it.[2] This idea is supported by a number of Qur'ānic verses. To strengthen this primary goal, the purposes of the *sharī'ah* pertain to this world as well as the next, and both have the interest of Man in sight.[3] There exists a slight disagreement among Muslim jurists on whether the law has been laid down with the interest of Man in view. The question was raised by al-Rāzī, who gives detailed, and often mind-boggling arguments, to show that there is no causal relationship between the

[2] Al-Shāṭibī, ii, 168:

المقصد الشرعي من وضع الشريعة إخراج المكلف من داعية هواه حتى يكون عبدا لله اختيارا كما هو عبد لله اضطرارا.

[3] Ibid. ii, 6

provisions of the law and the interest of Man.[4] He does concede, however, that though no causal relationship can be established between the interest of Man and the provisions of law, both are seen to be lying side by side. Thus, he agrees that there is no harm if the interest of Man is used as the underlying basis for a provision of law.

This debate was explained through a simple example in an earlier chapter in this book; there is no harm in repeating it. The example used was that of a factory producing something. In any factory, it is obvious that the sole purpose is the creation of a product for which the factory has been established. Every directive issued to the workers is intended to enhance the quality of the product or to create it on time, or to create a product that is more useful, or to increase its quantity. The factory does not exist for the workers, but for the creation of that product. However, the effective production of goods requires that the interest and welfare of workers be kept in view, because it will lead to a better product. If the worker performs well he is rewarded or promoted, because he is in harmony with the process leading to the ultimate product. If he does not perform well, he is not rewarded and may also be punished for a breach of discipline. The factory does have laws or rules to regulate the activity of the workers. These laws are laid down primarily to ensure an effective production of goods, though the laws may indirectly serve the interest of the worker.

In understanding the issue of the interest of Man we may, therefore, ask: Is Man the final product of this universe created by Allāh, or is the purpose of this universe something larger, larger than Man? If Man is the sole purpose, then, all laws must have been made to serve his interest. On the other hand, if the purpose of the creation of the universe is something other than Man, then, is Man in the position of the worker, a servant of Allāh (*'abd Allāh*), who is to be rewarded if he performs well and punished if he misbehaves? The laws in this case would appear to be lying side by side with the interest of Man, as al-Rāzī maintains, though they are actually serving some larger purpose. On the other hand, if Man is the sole purpose of the universe, the laws would be laid down to serve his interest alone. Thus, there would be a causal relationship between the laws and the interest of Man. In either case, the jurists agree that the interest of Man may be used for determining the underlying basis

[4] Fakhr al-Dīn al-Rāzī, *al-Maḥṣūl fī 'Ilm al-Uṣūl*, ms. Peshawar, Maktabah Mashriqiyah, Dār al-'Ulūm al-Islāmiyah, No. 630-B, fols. 203, a, b.

for a provision of law, and this interest may be kept in view while extending the law to new cases. This assumption forms the basis of the doctrine of *maṣlaḥah*, and of al-Ghazālī's theory of law discussed in the previous chapter.

Al-Shāṭibī maintains, however, that this discussion has no real significance, as far as the purposes of law are concerned.[5] The reason is that the purposes of law have been determined from the texts through a process of induction (*istiqrā'*) rather than through deduction.[6] This is the reason why the *maqāṣid* are considered definitive (*qaṭ'ī*), and can be relied upon without a doubt, and the same pattern is to be found in the other details of the *sharī'ah*.[7] He quotes a large number of verses of the Qur'ān to show how the ultimate purposes are indicated by the texts.

The idea that the *maqāṣid* have been derived through a process of induction from the texts, and are therefore definitive, runs throughout al-Shāṭibī's work. He distinguishes the *maqāṣid* from the general principles of law and the principles of interpretation through a precise terminology. He uses the terms *al-uṣūl al-kulliyah* or *kulliyāt al-sharī'ah* to refer to the *maqāṣid* as distinct from other terms like *uṣūl al-fiqh*, *qawānīn uṣūliyah*, and *qawā'id al-fiqh*, which are used to refer to the sources of law, the rules of interpretation, and the general principles of law.[8]

The purposes of law, in al-Shāṭibī's view, are of two types: those that relate to the intention of the Lawgiver, and those that relate to the intention of the subject.[9] The fundamental rule for the purposes of the subject is that his objectives must conform with the intention of the Lawgiver.[10] It is through the interaction of the two intentions that human actions are determined. The present study will focus on the purposes of the law that relate to the intention of the Lawgiver, and any reference to the purposes of law will refer to such purposes.

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[5] Al-Shāṭibī, *al-Muwāfaqāt*, ii, 7.

[6] Ibid.

[7] Ibid.

و إذا دل الإستقراء على هذا ، وكان مثل هذه القضية مفيدا للعلم ، فنحن نقطع بأن الامر مستمر في جميع تفاصيل الشريعة .

[8] Ibid. i, 30.

[9] Ibid. ii, 5.

[10] Ibid. ii, 331.

The purposes of law as determined by al-Ghazālī, and agreed to by most jurists including al-Shāṭibī, are first of two types: *dīnī* or purposes of the Hereafter and *dunyawī* or purposes pertaining to this world. The worldly purposes (*dunyawī*) are further divided into four types: the preservation of *nafs* (life), the preservation of *nasl* (progeny), the preservation of *'aql* (intellect), and the preservation of *māl* (wealth). These different types taken together yield five ultimate purposes of the law: *dīn* (religion), life, progeny, intellect, and wealth. All five purposes are called *ḍarūrāt* (necessities) and are the primary purposes of the law. The *ḍarūrāt* are followed by the *ḥājāt* (needs), which are additional purposes needed by the primary purposes. The third category is that of purposes that seek to establish ease and facility. These are referred to as *taḥsīnāt* or complementary purposes.[11] The precise legal meaning of these purposes has already been explained in the previous chapter.[12] The purpose in this chapter is to focus on the overall structure of these purposes and their significance for the social system as a whole.

It would be pertinent to point out here that some jurists, who were the contemporaries of al-Ghazālī or who followed later, have not given much importance to the scheme presented by al-Ghazālī. Among the contemporaries of al-Juwaynī, and even of al-Ghazālī, is al-Sarakhsī, who, in the author's view, is one of the greatest jurists in Islamic legal history. Al-Sarakhsī completely ignored all discussion of the *maqāṣid*. One jurist who followed a century later, and who was definitely aware of most of al-Ghazālī's works is Ibn Rushd (Averröes). He presented his own idea of the purposes of the *sharī'ah* and its ultimate values, at the end of his manual of law, *Bidāyat al-Mujtahid*,[13] in the following words:

> The *Qāḍī* (Ibn Rushd), may Allāh be pleased with him, said: It is necessary to know that the *aḥkām* of the *sharī'ah* are divisible into two kinds. One of these kinds is adjudicated by the judges, and the majority of the *aḥkām* we have mentioned fall under this category. The second kind are those not adjudicated by the judges, and most of these are in the recommended (*mandūb*) category. This category of the *aḥkām* are like responding to the Muslim greeting (*salām*), blessing one

[11] Al-Shāṭibī, ii, 8–13

[12] See the section on the purposes of law in the previous chapter.

[13] Ibn Rushd, ii, 349.

who sneezes, and the like, which are mentioned by the jurists at the end of their books that are called *Jawāmi'*. We have also thought of mentioning the best known of this category, God willing.

It is necessary, before this, to know that the legal *sunan* (practices) pertaining to conduct have as their purpose the virtues of the believer. Some of them refer to respect, to whom it is due, and to the expression of gratitude, to whom that is due. The *'ibādāt* are included in this category. These are the *sunan* governing ethical values. Some of the *sunan* relate to the virtue called *'iffah* (chastity, abstinence from undignified habits), and are of two kinds: *sunan* laid down about food and beverages, and *sunan* laid down about marital affairs. Some *sunan* refer to the requirement of justice and abstention from tyranny. These are the categories of *sunan* that require the maintenance of a balance in financial dealings, and the maintenance of a balance in personal relations (physical contact). Related to this category are (the *aḥkām* of) *qiṣāṣ*, wars, and punishments, as the maintenance of justice is the aim of all of these. Among them are *sunan* laid down for individual integrity, and *sunan* laid down for all kinds of wealth and its valuation, through which is intended the attainment of the merit called generosity, and the avoidance of the meanness called *bukhl* (covetousness). *Zakāh* is included in this category from one aspect, and is included in the communal sharing of wealth from another; same is the case with charity (*ṣadaqāt*). There are *sunan* laid down for social life, which is the essential condition for human life, and the preservation of its benefits concerned with conduct and knowledge, which are called statehood. It is for this reason that these *sunan* should be upheld by the leaders and the upholders of the *Dīn*. Among the important *sunan* for social life are those related to love and hate, and to cooperation for the maintenance of all these *sunan*, which is called *al-nahy 'an al-munkar, wa al-amr bi al-ma'rūf* (prohibiting the blameworthy and requiring what is good), and which is love and hate, that is religious, which occurs either due to the evasion of these *sunan* or due to the evil intent of the believer in the *sharī'ah*. Most of what the jurists mention in the *Jawāmi'*, among their books, is that which deviates from the four categories that are the merit of chastity, the merit of justice, the merit of courage,

> and the merit of generosity, and all kinds of worship (*'ibādah*) are like conditions for the fulfillment of these merits.

Nevertheless, most of the jurists followed al-Ghazālī in the discussion of the purposes of law.

13.3. The nature and structure of the *maqāṣid*

The structure of the *maqāṣid* is understood by appreciating the relationship of the primary purposes among themselves, and their relationship with the secondary and supporting purposes. These relationships are described by al-Shāṭibī through the statement and explanation of thirteen basic rules. In these rules he gets involved in detailed discussions, some which are of a theological nature and are not directly related to this study. As the *maqāṣid* are designed to ultimately serve the interests of the Hereafter, it is this relationship that may be examined first.

13.3.1. Primary purposes in the service of the Hereafter

The first purpose of the *sharī'ah* is to secure the interest of Man that pertains to the Hereafter. It is for this reason that the purposes are divided into *dīnī* or purposes of the Hereafter and *dunyawī* or purposes restricted to this world. The worldly purposes, in combination, seek to preserve and protect the interest of *Dīn*. Al-Ghazālī does mention that the second purpose, which is the preservation and protection of life, may be considered by some to have a higher priority, because without life there would be no religion. This argument takes collective life into consideration, and in this sense it would also hold true for the intellect too, because the existence of *'aql* is considered by jurists to be a condition of *taklīf* (legal obligation). He points out, however, that some provisions of the law clearly support the superiority of the interest of *Dīn*. For example, the interest of *Dīn* is preferred when the subject is asked to give up his life in the way of Allāh, that is, for *jihād*.

Al-Shāṭibī devotes three of the thirteen rules to the discussion of the Hereafter. The most important point he makes in this context is that the identification of the interests of Man has not been left to the whims and fancies of human beings, that is, to human reason, because all the purposes seek to establish and maintain life in this world to serve the interests of the Hereafter. He also points out that

benefits and harms are relative; they may vary from individual to individual, and from one situation to the other. If harm and benefit cannot be established directly from the texts, then, it is to be linked to what is usually considered beneficial or harmful. The general rule that he derives is that since the *maqāṣid* serve the interests of the Hereafter the determination of what is beneficial and what is harmful cannot be left to human reason. He seeks support from a number of Qur'ānic verses. One of these is:

وَلَوِ ٱتَّبَعَ ٱلْحَقُّ أَهْوَآءَهُمْ لَفَسَدَتِ ٱلسَّمَٰوَٰتُ وَٱلْأَرْضُ وَمَن فِيهِنَّ

And if the Truth had followed their desires, verily the heavens and the earth and whosoever is therein had been corrupted.[14]

In his view, the role of human reason begins after the *sharī'ah* has laid down the essential principles.[15] The first of the thirteen rules he expounds is devoted to this point.

The primary purpose of the *sharī'ah*, then, as indicated already, is to free Man from the grip of his own whim and fancy, so that he may become the servant of Allāh by choice, just as he is one without it.[16] The preservation and protection of *Dīn* is intended by the Lawgiver to achieve this.

13.3.2. The two faces of the *maqāṣid*

Perhaps the most important feature of the *maqāṣid* is their dual thrust. This point has been ignored by almost all the later jurists, except for al-Shāṭibī. The reason could be that al-Ghazālī did not mention it in detail in his books on *uṣūl*, though he did give a hint in *Shifā' al-Ghalīl*. He mentions this point in his book called *Jawāhir al-Qur'ān*.[17]

The dual feature of the *maqāṣid* is evident in the use of the terms *ibqā'* and *ḥifẓ*, which we may call preservation and protection. Al-Shāṭibī considers these two aspects of *ḥifẓ*. The first he says is "what affirms its elements and establishes its foundations."[18] The second is "what repels actual or expected disharmony."[19] The focus

[14] Qur'ān 23 : 71

[15] Al-Shāṭibī, ii, 48.

[16] Ibid. 38, 168.

[17] Al-Ghazālī, *Jawāhir al-Qur'ān* (Beirut: Dār Ihyā' al-'Ulūm, 1985), 32-35

[18] Al-Shāṭibī, ii, 8.

[19] Ibid.

of later jurists, and hence that of modern scholars, has been on the aspect of protection alone. Each purpose, however, has a positive or aggressive aspect and a negative or defensive aspect. From the positive aspect, the interest is secured by establishing what is required by the *sharī'ah* through each of its *maqāṣid*. Thus, the interest of *Dīn* is secured by the creation of conditions that facilitate worship and establish the other essential pillars of Islam.[20] The interest of life is secured by creating conditions for the existence of life.[21] The interest of progeny is supported by facilitating and establishing family life.[22] The interest of intellect is secured by promoting the means for the growth of the intellect.[23] The interest of wealth is secured by creating proper conditions for the growth of wealth.[24]

From the defensive or the protective aspect, interests are secured by preventing the destruction or corruption of the positive aspect. Thus, *jihād* is prescribed for defending *Dīn*, while prayer, fasting, pilgrimage, and *zakāh* help establish it. It is the duty of the *imām* to ensure proper conditions for both, while it is binding upon each subject to fulfill these duties, individually and collectively. Life is preserved through the provision of sustenance and the maintenance of good health, while it is protected or defended through the provision of penalties for those who destroy life without legal justification. *Nasl* is promoted through the maintenance of healthy family life and the institution of marriage, while penalties are provided for those who would corrupt it and destroy its values. The preservation of *'aql* is achieved through the provision of education and healthy conditions for its growth, while penalties are provided for the consumption of substances that destroy the intellect. Preservation of wealth is achieved by encouraging its growth, while theft or misappropriation of wealth is punished through penalties.

13.3.3. Primary and secondary purposes

The jurists break up the *maqāṣid* into three levels. This has already been pointed out. The first level is that of the necessities (*ḍarūrāt*) which they believe have been maintained by all societies and with

[20] Ibid. 9
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] Ibid.

out which existence of any kind of society is difficult. These are the primary *maqāṣid* and the jurists focus mostly on these. These are supported by the supporting needs (*ḥājāt*). The third level is that of complementary values and norms (*taḥsīnāt*). There are a number of details attached to each level. These details were discussed in the previous chapter.

The important point made by jurists about the significance of each level is that the primary purposes are supported by the two other levels. However, if the last two levels are abolished the primary purposes will stand by themselves. This is not true for the lower levels. Thus, the existence of *ḍarūrāt* and the *taḥsīnāt* depends upon the primary purposes and they cannot be maintained on their own.

The importance of the individual purposes within the *ḍarūrāt* is reflected in the order in which they are stated. Thus, *Dīn* has precedence over life, life has precedence over *nasl*, *nasl* has precedence over *'aql*, and *'aql* has precedence over *māl*. This is not all. Each of the primary purposes may divided into public and private purposes. The public purposes seek to preserve the interests of the community as whole, while the private purposes protect the rights of individuals. Again, the purposes are divisible into those securing the rights of Allāh and those preserving or protecting the rights of the individuals. There is a fine distinction between the two kinds of divisions, though many modern scholars tend to consider them identical. The distinction lies in the fact that there are three kinds of rights to be identified rather than two. These are right of Allāh, the right of the community as whole, and the right of the individual. Modern scholars ignore the distinction between the right of Allāh and the rights of the community as a whole, hence the confusion. This significance of these distinctions will become obvious later in this chapter.

The relationship that exists between the primary purposes may be highlighted by visualizing outer shells serving or protecting the inner shell or shells. Thus, the innermost shell is represented by the preservation and protection of *Dīn*. This represents the foremost purpose of the *sharī'ah*. The shell surrounding it is that of life, which is itself surrounded by *nasl* and so on. The outermost shell is that of the preservation of wealth that serves all the inner shells and is subservient to them.

Each primary purpose considered to be a necessity has its own supporting needs and complementary norms. These are also to be viewed as shells, one inside the other. This relationship is explained

by al-Shāṭibī through examples. Considering the example of prayer (*ṣalāt*), he says that the essential parts of the prayer are its *arkān* (elements) and *farā'iḍ* (obligations). Whatever is besides these is meant to complete and complement it.[25] The parts of prayer are distributed among the *maqāṣid* in such a way that each outer shell forms a protective boundary for the inner shell. One who crosses the outer shell or boundary will soon demolish the inner shell. Thus, the person who gives up the *nafl* (supererogatory) prayers will soon give up the *sunan*, and will finally demolish the *farā'iḍ*. There are many instances in the law, he says, that correspond with the analogy of *nafl* and *farā'iḍ*. For example, even a drop of wine or a small quantity of it is prohibited, because it leads to the consumption of larger quantities, though it does not intoxicate or damage the intellect. A severe penalty is provided for stealing a thing of small value as it leads to the stealing of larger amounts and to robbery.[26] In the same way, the ethical and moral norms hover around and protect the main and essential legal norms. The *ḥājī* and the *taḥsīnī* are, therefore, to be considered the servants of the *ḍarūrī*.

13.3.4. Priorities within the *maqāṣid*

The relationships described above indicate that some purposes have a higher priority than others, that is, they would be preferred in case of a clash between two interests. This fact also highlights an important point that while deciding a legal case or while attempting to understand the position of Islamic law on an issue, one cannot look at one purpose or interest alone. There is always a clash of two or more interests. This is achieved through the machinery of organized political society that seeks to strike a compromise between the conflicting wants, desires, and claims of individuals and between the competing interests. Looking at the purposes of law alone and identifying the priorities that exist between them would present a simplistic view of things. The *maqāṣid* are always used as a reference point for the general principles of the law, and this makes the situation highly complex. This was illustrated in the later parts of the last chapter while discussing al-Ghazālī's theory. Nevertheless, the *maqāṣid* considered alone present a fair picture of the entire system even for the layman, who is not trained in the law. If he observes

[25] Ibid., ii, 22

[26] Ibid., 22-23.

a few rules, he can easily determine the answer to a question that he may have about the law. For the present purposes, we shall describe three main rules that can be derived from al-Ghazālī's work. Al-Shāṭibī also acknowledges these, but not as clearly as al-Ghazālī did. Some other minor rules can be stated, but the idea is to avoid too much detail and technicalities.

Rule 1: The stronger interest shall prevail

The inherent strength of the interests secured by Islamic law is reflected in the order in which the *maqāṣid* are listed by the jurists. Thus, the preservation and protection of *Dīn*, as we have pointed out earlier, has preference over the preservation and protection of life; life has a higher priority than *nasl*; *nasl* is prior to *'aql*; and *'aql* is preferred over *māl*.

In practice this would mean, for example, that *jihād* has priority over preservation of life, and if an individual is asked to participate in it and give up his life in the cause of Allāh, there is legal justification for it. Preservation of life has a higher priority than the protection of *'aql*. Therefore, if a person is facing death in a desolate place due to lack of water and the only thing available to him is wine, he is under an obligation to save his life by drinking the wine. Life has priority over *māl* too and it is permitted to take the property of another person without fear of penalty during a famine, if such taking results in the saving of life or lives.

In the same way, the *ḍarūrāt* have priority over the *ḥājāt*, which in turn have priority over the *taḥsīnāt*.

Rule 2: The public interest is prior to the private

The different categories of the purposes can be understood in terms of public and private interests. Whenever a public interest is in conflict with a private interest, the public interest will prevail. The example used by the jurists is that of material handed over to artisans and craftsmen. The original rule of deposit (*wadī'ah*) required that this material being a deposit would not be compensated by the craftsmen in case it was destroyed, and the burden of proving tort (*ta'addī*) or negligence would be upon the customer, the owner of the property. This rule was changed to conform with the public interest, because the craftsmen were misusing the facility. The burden of proof was shifted to the craftsman, who had to show the absence of negligence. The Ḥanafīs based this change on *istiḥsān*. The example is expected

to show that the public interest requiring security of transactions and protection of property of the general public was given preference over the interest of individuals, that is, the craftsmen.

In this case, both interests, public as well as private, lie within the same category, that is, the preservation of wealth. Does the rule that the public interest prevails over the private cut across all the categories? Can a public interest in a lower category be preferred over a private interest in a category with a higher priority? Apparently it can. We shall discuss this point in the next section where the internal logic of the *maqāṣid* will be traced.

Another example used by al-Ghazālī upholds justification of taxation by the *imām* when the public interest is at stake. He permits a ruler in need of money to levy taxes in order to organize *jihād*.

Rule 3: The definitive interest prevails over the probable

This rule has been the cause of confusion for some jurists following al-Ghazālī, and the confusion is witnessed in the works of some modern scholars too. Al-Shāṭibī states very clearly that all the interests preserved and protected by the *sharī'ah* are definitive (*qaṭ'ī*). He repeats this point over and over again, and is in fact a fundamental assumption of his work. The question, therefore, arises that if all interests are definitive, where does the probable interest come from? This issue was discussed at some length in the previous chapter under the heading of "Improper *Istidlāl*." The two cases discussed there were (1) the case of the enemy using some Muslims as shields, and (2) the case of people in a boat who would like to throw some of their companions into the sea to save the rest. In this sense the *ẓannī* or probable interest does not fall within the *maqāṣid*. In other words, it is an interest that may appear to the jurist to be protected or preserved, but it is actually *gharīb*, that is, not acknowledged by the *sharī'ah* at all. The examples provided by al-Ghazālī were hypothetical and are not likely to exist in actual life. He used them to illustrate the distinction between an interest that is acknowledged by the *sharī'ah* and one that is rejected or is not acknowledged. This was explained in the previous discussion of these two cases.

13.4. Tracing the logic of the *maqāṣid*

In the previous section we have attempted to describe some of the important features of the purposes of law as they are found in the books of jurists, especially the works of al-Ghazālī and al-Shāṭibī.

There are, however, certain questions that may arise in the mind of the reader about which there might be no discussion in the works of these jurists. Many such questions can be answered by examining the structure of the *maqasid* presented by these jurists. During the course of our study, a few questions came to mind, but we have not been able to trace a direct answer to these in the books of the earlier jurists, or in the works of modern scholars. We shall list two such questions and then attempt to answer them according to our own understanding of Islamic law. Both points relate to the internal logic of the *maqasid*. The purpose is to show that this is a field that has not been fully developed by the jurists and there is room for interpretation and reinterpretation.

13.4.1. *Nasl* or the family unit?

The first point relates to the third purpose of Islamic law that has been described by the jurists as the preservation and protection of *nasl*. What is the exact meaning of this purpose? The purpose obviously is not to preserve the race of an individual, because distinctions based upon race are looked down upon by Islam. Some jurists have even tried to associate it with the protection of reputation (*'ird*) or integrity, in order to accommodate the offense of *qadhf*. The major focus, however, appears to be on the paternity of an individual. In that sense the offense of *qadhf* is also covered insofar as it denies the paternity of a person. Does the *shari'ah* seek to preserve the paternity of a person? Muslim communities are no longer organized according to tribal bonds, and the issues of paternity may be relevant for the operation of the law of inheritance alone. According to Muslim jurists, however, it is in relation to this purpose of the law that the Lawgiver has provided penalties for the married and the unmarried persons, who are guilty of unlawful sexual intercourse (*zina*). The offense of *zihar* (injurious assimilation) would convey the same meaning. Are these penalties designed to protect paternity? If it is conceded that they are, then, why punish homo-sexuality? There are no children in this case whose paternity may be questioned, acknowledged, or denied. In addition to this, the protection of paternity should not make a distinction between the married and the unmarried person. Why has a lesser penalty been prescribed for the unmarried person?

To our mind, the only way these penalties can be accommodated and the apparent inconsistencies resolved is by focusing on the institution of marriage. Islamic law has given great importance to this

institution and has provided numerous rules for its regulation. If the purpose of Islamic law is considered to be the preservation and protection of family life and family values, the contradictions disappear. The institution, one may say, is considered so important that severe penalties have been provided. The unmarried person has been assigned a lesser penalty, because he is considered to have been reformed and rendered fit for taking up the responsibilities of married life after the penalty is applied to him. In the case of the married person the penalty is death. Apparently the law considers that a married person who indulges in unlawful sexual intercourse destroys the foundations of the institution, ruining the lives of the members of his family in the process; this would ultimately ruin society itself. The same arguments may be provided for other sex offenses. According to this interpretation, family life would be considered one of the essential pillars of Muslim society. The interpretation would still include questions of paternity, but the focus will have shifted to the family unit as the foundation of the social system.

13.4.2. Public and private interests?

The second point pertains to the logic of all the *maqāṣid* with reference to the priorities described above. It was stated that *Dīn* has a greater priority than life, life has a higher priority than *nasl*, and so on. It was also stated that when the interest of life clashes with an interest having a lower priority, the interest of life is to be given precedence. For example, drinking of wine is allowed under duress, in order to save life. Stealing of property is permitted if it saves life during a famine. On the other hand, we see that theft is punished with the amputation of the hand. Here theft is an offense that attacks the interest of wealth, while amputation of a limb is associated with the interest of life. The interest of the protection of wealth has been preferred over another interest that has a higher priority; namely, life and limb. This means that a public interest, which is the protection of property, has been preferred over a private interest, which is the right to safety of life and limbs for an individual. Thus, a public interest in a category with a lower priority has been preferred over a private interest in a category with a higher priority. Again, penalties are provided for committing unlawful intercourse in order to protect the interest of *nasl* or the family unit, as explained above, but the penalties themselves are attacking the interest of life that has a higher priority. The same can be said for the penalty of whipping

provided for the drinking of wine or consumption of intoxicants. Here too a public interest in a lower category has been preferred over a private interest in a higher category.

To a student of modern law, where interests are organized as public and private, this may not present a problem. Modern law can with ease award a prison term of four hundred years to a person who is guilty of insider trading on the stock market or who has unlawfully manipulated junk-bonds. The point we are trying to make is that if public interests can cut across the boundaries of the *maqāṣid*, it might be better to organize the structure of the *maqāṣid* into public and private interests and then divide each into the five categories of *Dīn*, life, family, *'aql*, and *mal*. This may bring it closer to how interests are viewed in modern law.

There may, however, be an added level of complexity here, as far as Islamic law is concerned. In Islamic law, the right of Allah may not be the same thing as the right of the state or of the community. The jurists have drawn distinctions between them. Islamic law revolves around a system of rights. There are three kinds of rights that are distinguished: the right of Allah, the right of the state (*ḥaqq al-salṭanah*), and the right of the individual. The right of the state, which may be equated with the public interest, emerged later when the law had attained a level of maturity, and when the distinctions between the role of the state and that of the jurists appears to have crystallized. It was mentioned first by al-Māwardī and then by Ibn Rushd. Now, all the penalties falling under the category of *ḥudud* are classified by the jurists as a right of Allāh.[27] We may, therefore, say that in case of clash, the right of Allāh as emerging in one interest will be given preference over the right of the individual or even the right of state as reflected in a competing interest.

Our conclusion is that the simplistic structure of the *maqāṣid*, though essentially correct, may not be highly useful to the modern lawyer in the present form. Muslim jurists will have to work hard on refining and amending this structure in the light of the texts and the general propositions of the law.

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[27] This is true in the Ḥanafī system. The Shāfi'īs, for example, consider *qadhf* to be a right of the individual.

13.5. *Maqāṣid* and the Muslim community

We have tried so far to trace the evolution of the purposes of Islami law as they emerge from legal theory. Some of the essential featur of the *maqāṣid*, as they appear to the jurists, have been recorde in isolation from al-Ghazālī's legal theory. We are now in a positio to understand the significance of the *maqāṣid* for the entire soci system. Our study will be facilitated if we attempt to visualize th kind of community that is reflected in the purposes of Islamic law This would be the picture of a community that exists to fulfill achieve the goals that the *sharī'ah* has determined for it.

13.5.1. The Muslim community as a living organism

To draw a picture of the Muslim community with respect to th *maqāṣid*, we would like to seek support from the work of Rappapor Rappaport maintains that societies viewed as organisms are genera purpose systems whose ultimate goal is survival, "[G]eneral purpos systems," he says, "are players of the existential game, a game tha is peculiar in that the only reward for playing it is to be allowed t continue to play."[28] If the Muslim community is viewed as a gener purpose system in the light of the purposes of *sharī'ah*, it appea to be a living organism that has both external and internal goal The internal goals are designed to maintain equilibrium within th organism, while the external goals determine whether this organism aggressive and growing or is just playing the existential game referre to by Professor Rappaport.

External goals

What are the goals of the Muslim community? The moment th *maqāṣid* are viewed as the goals of the Muslim community, the in terest of *Dīn* moves up and represents its external goal. The positiv aspect of this interest conveys a single goal: to spread the messag of Islam in the whole world. The instrument utilized for attainin this goal is *da'wāh* in conjunction with *jihād*. There are numerou opinions on the meaning and role of *jihād* in the modern age. Thes however, are not relevant for the present study as we are looking f the traditional point of view. What is relevant is the opinion of th

[28] Rappaport, *Ecology, Meaning, and Religion*, 146.

jurists, and hence the law on this point. Ibn Rushd summarizes the views of the jurists as follows:

> Why wage war? Muslim jurists agreed that the purpose of fighting with the People of the Book, excluding the (Qurayshite) People of the Book and the Christian Arabs, is one of two things: it is either their conversion to Islam or the payment of *jizyah*. The payment of *jizyah* is (stipulated) because of the words of the Exalted, "Fight against such of those who have been given the Scripture as believe not in Allāh or the Last Day, and forbid not that which Allāh and His Messenger hath forbidden, and follow not the religion of truth, until they pay the tribute readily being brought low."[29] The majority of the jurists also argued about the taking of *jizyah* from the Magians, because of the saying of the Prophet, "Establish with them the practice adopted for the People of the Book." They disagreed about the polytheists other than the People of the Book, whether *jizyah* is to be accepted from them. A group of jurists said that *jizyah* is to be charged from all polytheists. This is Mālik's opinion. Another group exempted from this the Arab polytheists. Al-Shāfi'ī, Abū Thawr, and a group of jurists said that *jizyah* is to be imposed only upon the People of the Book and the Magians.
>
> The reason for their disagreement is the conflict of general and specific implications (in the texts). The general implication is in the words of the Exalted, "And fight them until persecution is no more, and religion is all for Allāh,"[30] and in the saying of the Prophet, "I have been commanded to fight mankind until they say, 'There is no God but Allāh.' If they say this their lives and wealth are protected from me, unless there is another claim on them, and their reckoning is with Allāh." The specific meaning is in the directive of the Prophet to the commanders of troops when he sent them to Arab polytheists who, it is known, were not the People of the Book, "When you come to face your enemy, the polytheists, invite them to opt for three choices," and he mentioned *jizyah* as one of them. The tradition has preceded.[31]

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[29] Qur'ān 9 : 29

[30] Qur'ān 8 : 39

[31] Ibn Rushd, *Bidāyat al-Mujtahid*, i, 284.

This leaves no doubt that the primary goal of the Muslim community, in the eyes of its jurists, is to spread the word of Allāh through *jihād*, and the option of poll-tax is to be exercised only after subjugation. Can the Muslim community suspend this activity in case of necessity or without it. Ibn Rushd provides the answer:

> Is truce permissible? A group of jurists permitted this initially (without warfare) without necessity, if the *imām* considered it to be in the interest of the Muslims. Another group of jurists did not permit it, except on the basis of a compelling necessity, such as the avoidance of disturbances or for gaining for the Muslim community some concessions from them, which are not in the nature of *jizyah* as the condition for *jizyah* is that they be subject to the laws of the Muslims, or even without taking anything from them. Al-Awzā'ī permitted that the *imām* may negotiate a truce with the disbelievers on the basis of something that the Muslims would give to the disbelievers if that is required as a necessity for avoiding (greater) trials, or on the basis of any other necessity. Al-Shāfi'ī said that the Muslims are not to make any concession to the disbelievers, unless they fear that they would be overwhelmed by the sheer number of the enemy, or because of a severe ordeal that they are subjected to.
>
> Those who upheld the permission of making a truce when the *imām* saw an interest (of the Muslims) in this are Mālik, al-Shāfi'ī, and Abū Hanīfah, except that al-Shāfi'ī stipulated that the duration of the truce should not be for a period greater than the one transacted by the Messenger of Allāh with the disbelievers in the year of al-Ḥudaybīya.
>
> The reason for their disagreement over the permissibility of truce without a necessity is the conflict of the apparent meaning of the words of the Exalted, "Then, when the sacred months have passed, slay the idolaters wherever ye find them,"[32] and His words, "Fight those who do not believe in Allāh nor the Last Day," [33] with His words, "And if they incline to peace,

[32] Qur'ān 9 : 5

[33] Qur'ān 9 : 29. Pickthall's translation has been changed here. His translation of this verse reads, "Fight against such of those who have been given the Scripture as believe not in Allāh nor the Last Day." This translation is correct, but only when the complete verse is taken into account.

incline thou also to it, and trust in Allāh." [34] Those who maintained that the verse commanding fighting unless they believe or pay the *jizyah* has abrogated the verse implying peace said that truce is not permitted, except in the case of necessity. Those who maintained that the verse implying peace has restricted the other said that truce is permitted if the *imām* considers it proper. They supported this interpretation with the act of the Prophet in this case, because his truce in the year of al-Ḥudaybīya was not based upon necessity.[35]

This shows that the aggressive propagation of Islam and the activity of *jihād* can be suspended with or without necessity in the opinion of some jurists, but it is only a transitory phase, for which some jurists fix a specified period, while others do not.

Professor W. Montgomery Watt maintains that the expansion of Muḥammad's city-state into an empire raised the expectation that the Islamic empire would ultimately include the whole human race.[36] We would agree with Professor Watt on this point with a slight qualification. The idea that Islam (not the Islamic empire) would ultimately include the whole human race is not based on early conquests alone, but is an acknowledged goal of the Muslim community, and it arises from the texts of the Qur'ān as well as the *Sunnah*, as quoted by Ibn Rushd above. According to such reasoning, the Muslim community may be considered to be passing through a period of truce. In its present state of weakness, there is nothing much it can do about it.

Will this community annul this truce, if tomorrow it were to gain in strength? Perhaps, this is what Watt has in mind when he says that that intentions of ultimate world domination are not so much a cause of worry for the non-Muslim states as are the treaties signed by the Muslim states, for "the division of the world into the sphere of Islam and the sphere of war is by no means a thing of the past. In so far as traditional Islam grows in strength it could come into the forefront of world politics."[37] Debating this point would be futile, and much depends on how far the world has progressed in terms of

[34] Qur'ān 8 : 61

[35] Ibid. 283–284.

[36] W. Montgomery Watt, *Islamic Fundamentalism and Modernity* (London, 1988), 2–4.

[37] Ibid.

justice, fair-play, mutual cooperation, and freedom from exploitation, by the time the Muslim community gains in strength. It is to be hoped that in this modern world, where religion has been given a back seat in the general scheme of things and where other problems that affect the planet as a whole loom large, the Muslim community will continue to maintain the truce and agreements in a spirit of cooperation and focus more on the institution of *da'wāh* (invitation) than on the instrument of *jihād* (holy war), especially when there are legal opinions supporting truce.

Internal Goals

Besides the external goal, the Muslim community has internal goals that may be said to represent subsystems. These are represented by the subsystem for the preservation and protection of life, the subsystem for the maintenance of the family unit and family values, the subsystem for the development of personality and intellect, and the subsystem for economic well being. How would these subsystems assist the Muslim community, or require it, to maintain internal equilibrium? It is obvious that these subsystems would be developed within the framework of the political system, the legal system, and the economic system developed by the Muslim community. These subsystems, that is, the legal, political, and economic, have been discussed at great length by many scholars. Our limited purpose in the present study is to see how *maqāṣid al-sharī'ah* govern these subsystems and regulate their operation.

13.5.2. The *maqāṣid* and the political system

To understand the operation of the *maqāṣid* in the Islamic political system, it is essential to summarize some of the ideas current in Islamic political thought. As a student of this field, I have always found that most of the ideas expressed by jurists and early thinkers appear to converge in the life and thought of Ibn Taymīyah. It would be instructive to narrate some of the efforts made by this great jurist and *mujāhid*.

Ibn Taymīyah and Islamic political thought

A large body of literature has been produced on Taqī al-Dīn Aḥmad Ibn Taymīyah in the modern age, but full justice has not been done to

his political thought. Born to a Kurd[38] family, six years before the extinction of the Baghdad caliphate, Ibn Taymīyah lived his life trying to fill the roles of a jurist, a reformer, and a valiant soldier of Islam. Similarly, identifying his mission in the evolution of Muslim political thought, he tried to forge a union, with necessary amendments, between the views of the jurists, the literary works of the administrators, and the ideas of the *falāsifah* (philosophers). This important aspect of his political thought has never been fully appreciated.[39]

The political thought that had crystallized and matured up to the time of Ibn Taymīyah is generally considered as three separate genres, or as three separate formulations of the theory of state: the juristic theory, the theory of philosophers, and the literary theory.[40] All these theories "set forth the divine nature of ultimate sovereignty and *presuppose the existence of state* within which the earthly life of the community runs its course and whose function is to guarantee the maintenance of Islam, the application of *sharī'a*, and the defence of orthodoxy against heresy."[41] All three formulations tend to con-

[38] Abū Zahrah thinks that the clan of "Taymīyah" was, most probably, of Kurdish origin. Abū Zahrah, *Ibn Taymīyah* (Cairo, 1962) 18. See also Qamaruddin Khan, *Political Thought*, 1.

[39] The most important work on Ibn Taymīyah is considered to be that of Henri Laoust, *Essai Sur Les Doctrines Sociales et Politiques de Taki-d-Dīn b. Taimiya* (Le Caire: Institut Francais D'Archeologie Orientale, 1939). The work of Qamaruddin Khan, *The Political Thought of Ibn Taymīyah* (Islamabad, 1973) and "Ibn Taymīyah's Views on the Prophetic State," *Islamic Studies*, IRI, iii (1964) 521-30, is the first attempt in the English language to systematically study the views of Ibn Taymīyah. Commenting on the work of Laoust, he says: "[T]he book does not in reality primarily deal with the political and social doctrines; it is an encyclopaedic work about Ibn Taymīyah, a critical analysis of all that he has written. The part that treats of his strictly political ideas does not comprise more than forty pages." Qamaruddin Khan, *Political Thought*, ii. Books and articles on Islamic political thought, which devote small sections to Ibn Taymīyah are E.I.J. Rosenthal, *Political Thought in Medieval Islam: An Introductory Outline* (Cambridge, 1958) 51-61; "The Role of State in Islam: Theory and the Medieval Practice," *Der Islam* (1973) 1-28; and Ann K.S. Lambton, *State and Government in Medieval Islam* (Oxford, 1981) 143-51. See also Victor E. Makari, *Ibn Taymiyyah's Ethics: The Social Factor* (California, 1983) 133-73.

[40] Ann Lambton describing these says: "Broadly speaking three main formulations can be distinguished; the theory of the jurists, the theory of the philosophers and the literary theory, in which I would include primarily mirrors for princes, but also the expositions of the administrators, since these are put forward mainly in literary works, and the scattered observations of historians on the theory of state." Lambton, *State and Government*, xvi.

[41] Ibid. xvi (emphasis added).

centrate on the position of the ruler,[42] but the juristic theory, which was developed gradually by the Ash'arite school, was occupied with the historical continuity of the *ummah*; it considered the *shari'ah* as supreme and upheld the *khilāfah* as the symbol of this supremacy.[43] According to Gibb, the theory collapsed trying to legitimize the usurpation of power by the sultans and the *amirs*.[44] Al-Mawardī and al-Ghazālī both tried to justify the necessity of the universal caliphate and at the same time made concessions to the warlords. This was the beginning of the collapse of the theory. Al-Ghazālī had recognized that in his time government was a consequence solely of military power and whosoever had the allegiance of the holder of military power became the caliph.[45] While al-Ghazālī included the sultanate as a necessary element in the universal caliphate, by the time of Ibn Taymīyah, his contemporary Ibn Jamā'ah went further and accepted the possibility of the absorption of the caliphate itself into the sultanate. "[T]he element of coercive power had, as it were, swallowed up the primary element in al-Ghazālī's caliphate, the *imām*."[46]

Ibn Jamā'ah was writing after the extinction of the caliphate, when the earlier juristic theory had lost all meaning, but he made his proposal in complete disregard of some of the legal issues involved. For Ibn Taymīyah the absorption of the caliphate was not a simple problem; it faced a legal obstacle. A rule had existed in law that all acts of the community derived their legal validity through the delegation of authority by the *imām* and needed his overall supervision and approval. This authority had been derived from the Prophet, whose successor (*khalīfah*) the *imām* was. This rule is best expressed in the words of al-Ghazālī, who points out that the absence of the *imām* (or *khalīfah*) would nullify all acts of the community and involve them

[42] Ibid. xvi. *Cf.* Rosenthal, *Role of State*, 23: "There is a first group of writings known as "Mirrors for Princes" which aim at the ruler, not at the state, and tend to give good advice." He appears to imply that the other theories concentrate on the state, or *khilāfah*.

[43] Hamilton A.R. Gibb, *Studies on the Civilization of Islam*, Shaw and Polk, eds. (London, 1962) 141-42.

[44] Ibid. 141, 164. "By this he appears to mean that the theory failed to make any credible assertion about a particular person having a right to rule." W. Montgomery Watt, *Islamic Political Thought* (Edinburgh, 1981) 102.

[45] Gibb, 142-43 quoting al-Ghazālī *Ihyā' 'Ulūm al-Dīn*, ii, 124. See also al-Ghazālī *al-Iqtiṣād fī al-I'tiqād* (Ankara, 1962) 234-41.

[46] Lambton, 139, 141.

in sin. Discussing the consequences of the absence of the *imām*, he says: "The judges are suspended, the *wilāyāt* (authorities) are nullified, marriages are void, the decrees of those in authority cannot be executed, and all human beings are on the verge of *ḥarām*."[47] This idea also underlies the obligatory nature of the *imāmah* and gives meaning to the historical continuity of the *khilāfah*. It explains why the jurists, before Ibn Taymīyah, clung to the concept of *khilāfah*, even though in practice it had ceased to have any significance. This rule was demolished by the Mongols, when they put the Baghdad caliphate to the sword.

Once this rule had been crushed in practice, Ibn Taymīyah set himself the task of demolishing its theoretical remnants. To do so, he did not "presuppose the existence of a state" from the earliest times. He went back to the period of the Prophet and denied that the state as implied by the concept of *khilāfah* had ever been established by the Prophet. He declared that the period of the Prophet could not be described as anything but *nubūwwah*. The Prophet's authority arose from his function as a Prophet and not as the head of a state. While it is true that Ibn Taymīyah is primarily answering his opponents among the Rawāfiḍ and the Shi'ites, the idea of the non-existence of a state in those early stages is essential to his political thought.[48] Once this point is established, Ibn Taymīyah proceeds to separate the period of the first four caliphs from that of the Umayyads, calling the former as *khilāfat al-nubūwwah* and the latter as *mulk*.[49] He sees the *khilāfat al-nubūwwah* not as a state, but as an overflowing of the task begun by the Prophet. This task could only be handled by

[47] Al-Ghazālī, *al-Iqtiṣād*, 240.

[48] Qamaruddin Khan after devoting almost half is book to the views of Ibn Taymīyah on *nubūwwah* and *khilāfat al-nubūwwah* finally wonders why Ibn Taymīyah should deny the existence of a state in both cases. He says: "Now the question is: why did Ibn Taymīyah propound such an impossible theory, when his other political speculations seem to be sound and reasonable? The answer is not far to seek. He wrote the *Minhāj*, which is the main source of this idea, only to counter Shi'ism...." Failing to find a plausible reason he attributes this to the polemics with the Shi'ites. This reason is partially valid, but to view it purely as a polemical device is beyond comprehension. On the basis of this reasoning, the major portion of Ibn Taymīyah's political thought can be set aside as being based on such disputations, merely because it is contained in the four volumes of the *Minhāj*. In fact, Qamaruddin Khan wishes to assert the existence of an Islamic state in the period of the Prophet and arguing with Ibn Taymīyah on this point is not very difficult. See Qamaruddin Khan, *Political Thought*, 52-97, 92.

[49] See Ibid. 65-97 for a detailed discussion.

those who were inspired by a very close contact with the Prophet.[50] The *khilāfat al-nubūwwah* being inspired could not be passed on in succession or even imitated. The only thing that could be passed on was the principle of the supremacy of the *sharī'ah*. This principle could work efficiently whoever the ruler or rulers, one or more.[51] This is the crux of the matter. By detaching this principle from its symbol, the *khilāfah*, Ibn Taymīyah provided the legal foundation for a multiplicity of states. He also denied the concept of *khalifat Allāh*,[52] which tended to invest the rulers with divine rights and elevate them above the *sharī'ah*; it made the rulers supreme in place of the *sharī'ah*.[53] Thus, with the idea of the supremacy of *sharī'ah* and its legal implications, the view that the validity of all transactions depended on the universal caliphate appeared to be a fiction.

After detaching the principle of the supremacy of *sharī'ah* from the concept of *khilāfah*, Ibn Taymīyah started building up his theory of *imāmah*, by amending the existing juristic theory and by incorporating elements from the literary theory and the theory of the philosophers. In doing so, Ibn Taymīyah appears to be highly conscious of the separation between theory and practice in matters of law and the administration of justice. His general program, the *siyāsah shar'iyah*, a powerful exposition of his views on the *imāmah* should, therefore, be considered a uniform whole designed to subject all aspects of human life to the dictates of the *sharī'ah*.

He first outlined the concept of *ummah*. For him the *ummah* was composed of the *ahl al-sunnah wa al-jamā'ah*, who are the *ummah wasaṭ*, the upholders of the principle of *tawḥīd* and "who are the repository and custodians of the thought and practice of the Prophet, and his Companions, and who represent the original Islam."[54] The real sovereignty, however, "devolved with the death of the Prophet upon all those who by their learning and virtue were the authorized interpreters of the law and, therefore, charged with adapting it to new conditions of time and place."[55] He conceived of not one, but

[50] Ibid. 82-83.

[51] Ibid. 93.

[52] He called the concept not only linguistically wrong, but inherently absurd. Ibid. 78.

[53] The introduction in India of the *dīn-i ilāhī* by the Mughul emperor Akbar is a case in point.

[54] Ibid. 115.

[55] Lambton, 145. *Cf.* Qamaruddin Khan, *Political Thought*, 137: "The sense of

a multiplicity of states,[56] and talked in his *al-Siyāsah al-Shar'iyah* in terms of rulers rather than one ruler.[57] With the removal of the limitations imposed by the universal caliphate, such a notion did not pose any problems for him. He rejected the concept of the *ahl al-ḥall wa al-'aqd* as a kind of clergy and did not admit the doctrine of election, considering it a fiction.[58] Al-Māwardī's idea of one, two, or three electors is, consequently, rejected.[59]

He retained the principle of *shawkah* (coercive power) as it had been developed by al-Ghazālī, along with the concept of *mubāya'ah*.[60] Al-Ghazālī had explained that the purpose of *shawkah* was to gauge public opinion as a large number of divergent opinions were gathered in one person possessing *shawkah* by virtue of his following. He says in his *al-Iqtiṣād*: "The purpose is that a large number of divergent opinions be gathered in one person commanding obedience, and the *imām* comes to command obedience ...through the *mubāya'ah* of this person."[61] Ibn Taymīyah turned down the idea of the *imām* being from the tribe of *Quraysh*, considering it as valid only for the period immediately following the death of the Prophet.[62] As for the relationship that exists between the ruler and the subjects, it is not only that of principal and agent (*wakīl*), but the *imām* is also the *walī* (guardian) and *sharīk* (partner) of his subjects.[63] Ibn Taymīyah's views about deposing the unjust *imām*, however, were no different from those of his predecessors.[64]

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this passage is not as Laoust and Rosenthal have averred, that the *'ulamā'* in an Islamic state enjoy individual magistracy or collective sovereignty."

[56] Qmaruddin Khan, *Political Thought*, 122-23.

[57] Ibn Taymīyah *al-Siyāsah al-Shar'iyah* (Beirut: Dār al-Kutub al-'Arabīyah, n.d.) 2-3; Qamaruddin Khan, *Political Thought*, 123; Lambton, 147-48.

[58] Lambton, 148; Qamaruddin Khan, *Political Thought*, 133-35.

[59] Qamaruddin Khan, *Political Thought*, 133.

[60] See Ibn Taymīyah *Minhāj al-Sunnah al-Nabawīyah fī Naqḍ Kalām al-Shī'ah wa al-Qādarīyah*, 4 vols. (Cairo, 1321 A.H.) iv, 237.

[61] Al-Ghazālī, *al-Iqtiṣād*, 238.

[62] Qamaruddin Khan, *Political Thought*, 144-45.

[63] Lambton, 149.

[64] Rosenthal, *Role of State*, 21.

The relationship of Ibn Taymīyah's views with those of the *falāsifah*, particularly al-Fārābī, is explained in some detail by Rosenthal.[65] The idea of *ummah wasaṭ* is traced to Aristotle's *mesotes*. The politico-juridical function of the Prophet is considered similar to that of the philosopher-king in the exposition of al-Fārābī.[66] Ibn Taymīyah's two classes in authority, the *'ulamā'* and *amīrs*, are taken to correspond partly to Plato's philosopher-kings and plebians. Some other parallels are also drawn by Rosenthal, who adds that "this must not blind us to the fundamental differences which are naturally more in evidence in Ibn Taymīya than in al-Fārābī and in Ibn Rushd."[67] One thing is certain, though, that Ibn Taymīyah was conscious of the power of such ideas over a large number of Muslim jurists and thinkers,[68] and he could not ignore these ideas completely. He, therefore, employed as many as he possibly and safely could.

According to Lambton, the underlying idea of the literary theory was "justice,"[69] but this could as easily be traced to Plato and Aristotle as the principal "political" virtue.[70] Nevertheless, Ibn Taymīyah discusses his idea of *siyāsah 'ādilah* and considers the establishment of justice as one of the fundamental aims of *wilāyah* and envisages *amānah* and justice as the two essential qualities of the government by the *sharī'ah*.[71] On the whole, Ibn Taymīyah realized the importance of "*siyāsah*" literature as a separate field. This realization is found in al-Ghazālī before him.

While al-Ghazālī had kept his writings separate, Ibn Taymīyah merged the "*siyāsah*" and the *sharī'ah* elements to compose his *al-Siyāsah al-Shar'iyah*, apparently in the attempt to reduce the gap

[65] Rosenthal, *Political Thought*, 51-61.

[66] Lambton, 144.

[67] Rosenthal, *Political Thought*, 58.

[68] Rosenthal speaking about the influence of Greek-Hellenistic thought in Islam says: "I am inclined to see in it an analogy, a mode of expression adopted by the jurists in an attempt to counter the philosophers and their challenge. The possibility, however, cannot be excluded that the political thought of the *Falāsifa*, which owes so much to Plato and Aristotle, sharpened the eyes of the jurists writing on constitutional problems and led them to appreciate the theoretical basis underlying the struggle for power in their day." Ibid.

[69] Lambton, xvii.

[70] Rosenthal, *Political Thought*, 55.

[71] Qamaruddin Khan, *Political Thought*, 153.

between theory and practice. This treatise has much in common with the *siyāsatnāmahs* of the administrators and other kindred literature.

Ibn Taymiyah had a burning desire to restore the purity of Islam and to establish a new bond between the *ummah* and the *sharī'ah*, beyond the existence of a "more than shadowy caliphate."[72] His writings and teachings not only exerted a lasting influence in his own times, but also on Muslims in the modern times, who wanted to establish an Islamic state on the basis of the *sharī'ah*. Some of the reforms advocated by him were actually implemented by the Mamlūk sultan.[73] His influence on Wahhabism in particular and on a host of modern Muslim scholars is well known. In these terms, he may be said to be one of the most influential writers in Islamic history. "But since his reforms tended to lead back to a golden but primitive past through his narrow interpretation on what constitutes Sunna and what *bid'ah* (innovation), his plea for a *siyāsa shar'iya* went unheeded, and his appeal to the *umma wasaṭ* met with little or no response."[74] In addition, he had not only underestimated the struggles for power, but also the bias and deep prejudices of the *ulamā'* of different schools, to whom he had accorded a prominent place in his system. Above all, he had failed to lay down in clear terms a methodology,[75] acceptable to the various schools and in conformity with their own systems, for the reinterpretation and application of the *sharī'ah*.

Maqāṣid and the supremacy of the *sharī'ah*

The main idea that emerges from the efforts of Ibn Taymiyah, as discussed by various scholars, is that of the supremacy of the *sharī'ah* in a multiplicity of Muslim states. Once the supremacy of the *sharī'ah* is conceded as a basic principle, it becomes a simple matter to assess what such supremacy entails. To our mind, the supremacy of the *sharī'ah* means the total implementation of the purposes of the

[72] Rosenthal, *Political Thought*, 60.

[73] Rosenthal, *Role of State*, 20.

[74] Rosenthal, *Political Thought*, 60.

[75] Ibn Taymiyah did not attach much importance to the difference of the jurists, but he did lay down some methods to bring uniformity into the law in his *Qā'idah fi Tawaḥḥud al-Millah*. He also did not attempt to recreate a uniform code, instead he gave opinions on a large number of issues. These were gathered in his *al-Ikhtiyārāt al-'Ilmiyah*. Qamaruddin Khan, *Political Thought*, 117. Apparently, these efforts were not sufficient.

sharī'ah by each Muslim community. This would imply in turn th
the form of government adopted by each community, though impo
tant in itself, does not affect this fundamental rule. Each communi
must maintain the supremacy of the *sharī'ah*. This supremacy will
self ensure that justice is maintained and the rights of each individu
or group are secured through the due process of the law.

Thus, each community must establish *dīn* in accordance with t
first purpose of the law. It must ensure the safety and welfare of
human beings under its governance. This is done by providing
means of sustenance and shelter in accordance with the second pu
pose of the *sharī'ah*. The state must establish conditions for a sou
family system in accordance with the dictates of the *sharī'ah* a
the requirements of the third objective. This obligation is follow
by the duty to provide conditions for the growth of healthy mind
The only way this can be done is by providing freedom of expressi
and a sound and universal education. This is the only way that t
fourth objective will be attained. Finally, the state must also ensu
the economic well being of the community as a whole. All these d
ties must be accomplished in the listed order of priority, as require
by the structure of the *maqāṣid*.

The duties of the rulers or the government aside, the major que
tion that is faced in such a discussion is whether democracy is uphe
by Islamic law as a means of good governance. In the author's vie
it is the preferred form that is advocated by Muslim jurists. T
imām is always considered to be the agent (*wakīl*) of each citize
The contract of *bay'ah* is only a form of voting. The principle
shawkah was only a means of assessing the number of supporters
leader would have. This is clearly indicated by al-Ghazālī above. H
says: "The purpose is that a large number of divergent opinions b
gathered in one person commanding obedience, and the *imām* com
to command obedience ... through the *mubāya'ah* of this person."[76]
Today, it is up to the Muslims to implement the best system tha
can measure "a large number of divergent opinions." For the presen
democracy seems to be the only system that best conforms with thi
A democratic government must guarantee the implementation of th
purposes of the *sharī'ah*, and consider this to be its primary dut
The basic rights of the citizens must flow from the *maqāṣid*.

[76] Al-Ghazālī, *al-Iqtiṣād*, 238.

13.5.3. The *maqāṣid* and the economic system

The economic system within a state is usually a reflection of the priorities determined by a nation for itself. In an Islamic state, the priorities of the economic system are determined by the *maqāṣid*. The preservation of wealth, as we have seen above, is a purpose with the lowest relative priority. This does not imply that it has the least importance. The economic sub-system within the larger system represented by the Muslim community is required to serve the interests determined by the first four purposes of the *sharī'ah*. Thus, the economy must be geared to meet the requirements of *dīn* as well as *jihād*. The second priority goes to life and the means of livelihood. The economic system must ensure that there is no one homeless or hungry within the community. After handling this, the next priority for this subsystem is to provide the basic means for pursuing a healthy family life. This will be followed by education and the development of the intellect. Once these needs have been met, the economy will pursue the goal of increasing wealth itself. This goal will be subject to the constraints placed by the *sharī'ah* as regards *ribā* and speculation in essential commodities. If the Muslims think today that a free market would attain this sub-goal, then, there appears to be no harm in it, as long as the first four goals have been met.

The real problem for the economic subsystem, and for Islamic economics as a discipline, is to identify in the light of the *maqāṣid* what kind of distributive justice is advocated by Islam. The measures advocated by modern scholars are somewhat vague. An indication of the kind of distributive justice prevailing in a community is the way it allocates and distributes social goods among its members. This in turn depends on the history and cultural heritage of the community from where the common and shared ideals of this community are derived. The Muslim community has its own ideals and is, therefore, distinct from other communities. These ideals are represented by the *maqāṣid al-sharī'ah*, which provide uniform norms to be pursued by the political, legal, and economic subsystems. An attempt to implant the ideals of another culture on to this community is likely to be hazardous and may even thwart its progress, because of the confusion this might cause. This is what is being witnessed all over the Muslim world today, as Muslim communities vacillate between Western principles of distribution and the shared ideals that have been handed to them by history. Before Muslim communities can revert to the

shared ideals of their members, these ideals need to be translated once again, into principles that would work in the modern age. Muslim economists appear to be occupied with this task, as most of their discussions pertain to issues of distributive justice.

The discipline of Islamic economics is still in its infancy, and needs nourishment from the law. This is the main reason why many of the works of these scholars deal with questions of law that have a bearing on economics or with questions of distributive justice. The idea appears to be that once Muslim communities adopt their own principles of distributive justice and shape their economic policies accordingly the nature of their economies will change, and the discipline of Islamic economics will come into its own. Because economics is, on the whole, a positive science and studies conditions as they exist, it is only after the operation of economic policies based on the true principles of Islamic distributive justice that Islamic economics will come to be a recognized discipline. Even when economics is occupied with some higher values, it is with values that are being implemented or are operative in a given society. The Islamic principles of distributive justice are not operative in the true sense in any state, and the economic policies of these states are not determined by those principles.

There is, therefore, very little that Islamic economics has to go on. In our view, the first thing that Muslim economists need to do is to determine the general economic policies that Muslim states need to follow on the basis of the principles of distributive justice expounded by Islam. Proposing such policies is not enough. It must be shown that these principles truly emerge from the traditional literature and traditional values. The attempt by some modern scholars to link the principles of distributive justice to the concept of *tawḥīd*, while interesting is not very useful, as such concepts are difficult to reduce to a traditional legal content. A large part of the concept would have to be justified on the basis of personal opinion, and this may not be acceptable to others. The first place to look for the principles of distributive justice should, therefore, be traditional legal theory. This will ensure that these principles and values are really shared by all. It is the only way that the principles will be acceptable to the Muslim masses.

The principles of distributive justice found in the traditional texts, as represented by the *maqāṣid*, are not fixed and rigid. They have been left vague and flexible by the Lawgiver, so that Muslim communities in different ages might reinterpret them to suit their circumstances. If Muslim states agree to implement the policies pro

posed by the economists, a beginning will have been made. Till such time that this is done, the discipline of Islamic economics will remain in the realm of the "should-be."

What is important to realize, however, is that Islamic economics as a discipline is not the goal here. This discipline is merely a tool to understand and analyze the impact of the economic policies actually pursued by Muslim states. Once this impact is analyzed, it can be used to propose amendments to the policies, again in the light of Islamic principles of distributive justice. The primary focus of Muslim economists, till such time that Islamic economic policies are implemented in a comprehensive way by Muslim states, should be on the shared ideals of distributive justice in a Muslim community or state, and on the allocation and distribution of social goods in pursuance of these principles. Hand in hand with the principles of distributive justice go the laws of Islam that have a bearing on economic policies, though what we mean by social goods applies to whatever is covered by law. Muslim economists have done considerable work in the last two decades, but a comprehensive theory that knits all these principles within comprehensive proposed policies is still lacking. One reason for the lack of a general theory could be that the true nature of the Islamic legal system has not been understood, nor has the relationship between the operation of the legal system and the operation of the system of distributive justice been fully appreciated.

The principles of Islamic distributive justice, it is maintained, are to be found in the Qur'ān and the *Sunnah* (decisions and practice of the Prophet). The Muslim economist who wishes to derive these principles has three choices: to derive them again directly from the Qur'ān and the *Sunnah*; to rely solely on the works of the early jurists; or to use both methods. Some economists are following the first method, while others are following the third, which in our view is preferable, as it builds on the work of the preceding generations. The author is no economist. His occupation for the last one and a half decade has been with Islamic law and the work of the jurists. He must, if he takes up the task, follow the second course, and endeavor to highlight the views of our predecessors. It is, therefore, stated that the principles of Islamic distributive justice are visible within the purposes of the *sharī'ah*, and it is from these norms that a detailed system of distributive justice must be constructed. This is a prerequisite to all progress in the discipline of Islamic economics.

13.5.4. The *maqāṣid* and the legal system

What has been said about the principles of distributive justice hold true for the principles of Islamic legal justice as well. There is a lack o theoretical conviction on what strategy, or combination of strategies is best for the Islamization of laws. Some scholars accustomed t European civil law have been proposing the complete codification o laws, while others used to English common law have proposed th declaration of the supremacy of Islamic law based on the Qur'ān and the *Sunnah* to be enough, leaving the rest to judges trained i the common law. The Islamic Republic of Pakistan, for example, ha boldly adopted the latter course. It is a bold step, but the questio is whether the Islamic system will grow naturally into or out of th English common law obtaining in that country. Is there a consensu among judges trained only in the common law and the *ulamā'* judge trained only in the traditional law as to what shape Islamic law is t take in the modern age? What is the structure of this law? Which o the various methodologies of interpretation is to be employed? Wha kind of rights are secured by this law and in what order of priority? Is it enough to say that the judge will look for a ruling first in th Qur'ān, then in the *Sunnah*, and then follow his own reasoning?

In addition to this, there are scholars who have held that th principle of *maṣlaḥah* is the key to the development of Islamic law in modern times. This may be true, but is it clear what this princi ple stands for or how it is to operate within a modern legal system? Again, there is the ludicrous attempt by some to associate this prin ciple with Bentham's principle of utility. Further, there is a certain vagueness that surrounds the meaning of the phrase "principles o Islamic law as found in the Qur'ān and the *Sunnah*." The truth is that while one often hears this phrase, it is not clear what is meant by the term principles here, or even what a principle means in Islamic law in legal terms.

The purpose here is not to be critical, but to point out that there is lack of a concerted effort on the part of the scholars of Islamic law as well as Muslim judges and lawyers, to arrive at a comprehensive shared strategy for the Islamization of laws. Indeed, great strides have been made by the people of Pakistan in the area of Islamic law as well as Islamic banking, when many other countries are merely paying lip service. The efforts made in other countries in the area o Islamic banking are to be appreciated too, especially because these are based on private efforts. The aim of this work is to point out

the need for injecting some system into the whole enterprise. This is possible through the proposal of a comprehensive strategy that is subjected to penetrating analysis by Muslim scholars all over the world.

Our conviction is that the real reason for a lack of a comprehensive strategy is that the work of our predecessors is being neglected. It is difficult, if not impossible, to go directly to the Qur'ān and the *Sunnah* and come up, in a short time, with a legal system that will be able to solve the problems of the modern age. It will require decades, if not centuries to do so. On the other hand, early Muslim jurists took at least five centuries to plan the details of this legal system. They have left a blueprint that can be used to erect the structure of a modern legal system. The preliminary step for each person occupied with their work appears to be to understand the outlines of the proposed system and then record his own impressions of it. If the conclusions are incorrect, or misfounded, others will correct them.

It is in this spirit that this book has been written. All that is contained in this book may in a way be subsumed under the heading: The *maqāṣid* and the Islamic legal system.

13.6. Priorities: Islamic and Western

We now have a clear picture of the priorities postulated by the *maqāṣid al-sharī'ah* or the purposes of Islamic law. If we try to compare these with the priorities, actual or estimated, in Western countries it would help in understanding some of the differences between the two communities better. This may be done briefly here, because a detailed analysis would require an exhaustive study.

We have seen above that the highest priority is assigned to the interest of *Dīn* by the jurists of Islam. Religion in the West, on the other hand, has been reduced to a level with a lowest priority. In fact, it is not even a public interest; it is a personal affair. Some Western scholars have hinted that the Muslim community should follow suit and reduce religion to a private affair. The privatization of Islam will alter the structure of the *maqāṣid* as seen by the *fuqahā'*.

When we examine the priorities in certain Western countries as a whole, especially in countries like the United States of America, we get the impression that the priorities may be entirely reversed as compared to those for the *maqāṣid*. Consider, for example, the statement: What is good for General Motors is good for the United

States. This would imply that the preservation and protection of wealth has the highest priority in the United States. Consider the preservation and protection of *'aql*. This is a lower category in the Islamic system, but it could be a higher category in the United States when viewed in terms of freedom of expression.

As such a comparison needs to be based on accurate and reliable information requiring exhaustive research, we will not pursue the matter any further. The general idea was no more than to indicate that the priorities for the West might be visible in the reverse order.

Part III

Ijtihād Today

We have now reached the stage where we can derive some benefit from our study of the concept of Islamic law and of legal theories. During the course of this study, a number of claims have been made and arguments from Islamic legal history have been advanced to support them. The conclusions drawn separately will have little benefit unless they are knit into a meaningful theory, a theory that can help us understand the Islamic legal system and point to the direction that a legal system based upon the principles of Islamic law is expected to take.

This third part is, therefore, devoted to an analysis of what was described in the first two parts. The analysis will be recorded in the form of lessons that we derive for our future behaviour and the ways in which we can promote the activity of *ijtihād* in the present age. Accordingly, the first chapter in this part will focus on the lessons to be derived from Islamic legal history, while the second chapter will outline the current and possibly the future mode of *ijtihād*.

Chapter 14

Lessons From Legal History

14.1. A theory of Islamic law

The attempt to formulate a theory of Islamic law will be easier and appear more meaningful if one or more existing theories are first stated. Muslim scholars, as has been stated earlier, have not formulated a comprehensive theory about Islamic law or about the Islamic legal system. There is no explicit statement about the alleged separation between theory and practice, except what we mentioned in the earlier chapters. There is a vague agreement that *uṣūl al-fiqh*, despite the varying views of the schools, is to be treated as a uniform and single discipline, yielding a single method of interpretation. Questions of analytical consistency of the principles of interpretation are not answered. The only theory that can be identified is the one gleaned from the writings of the Orientalists. The first two parts of this study may be said to have been undertaken, in part, to counter this theory about Islamic law constructed by the Orientalists. What is this theory and what are its features that we find to be inconsistent with the nature and structure of Islamic law? We will attempt to state this theory in one paragraph, and then analyze it.

> The Orientalists, in general, maintain the view that Islamic legal theory, by which we mean a system of interpretation, did not exist before al-Shāfi'ī.[1] The law before him was based on

[1]This is widely accepted not only in the West, but also in the Muslim world. The reason is that the first book on legal theory was written by al-Shāfi'ī. Wael

"personal opinion" (*ra'y*) and Umayyad practice.[2] The theory presented by al-Shāfi'ī was accepted, with some modification, by all the Sunni schools after him, however, this "[c]ommon legal theory, the discipline of *uṣūl al-fiḳh*, has little relevance to the positive doctrine of each school,"[3] because the essential features of the law as we know it were already visible by the year 132 of the Hijrah, much before al-Shāfi'ī's time.[4] The positive doctrine (that is, *fiqh*) itself was a jurists law based on the analogical method and, therefore, rigid. The result was that legal fictions or casuistry had to be resorted to for countering this rigidity and for bridging the widening gap between theory and practice.[5]

The fundamental assumption underlying this view, or views, is that there has always existed a gap between the law propounded by Muslim jurists and the actual practice of the Muslim state. From this it follows that if the law derived by the jurists could not meet the needs and demands of an ever growing empire it must have been rigid. This appears to be their logical conclusion. In support of this view, it is claimed that the *ḥiyal*—referred to as legal fictions by some and casuistry by others—were employed to counter the effects of this rigidity, which in turn confirms that the system was in fact rigid. The following main points can be recognized in these views of the Orientalists:

B. Hallaq in a recent article has challenged the view that al-Shāfi'ī was the real architect of Islamic jurisprudence. See section 10.1.1. in this book.

[2]This conclusion about personal opinion is widely accepted, while the conclusion about the law being based on Umayyad practice was drawn by Joseph Schacht. It is linked to his thesis about the apocryphal nature of the traditions, the idea being that Umayyad practice was converted into traditions and then converted into law, while Umayyad practice itself was based on materials and institutions drawn from Roman law and Jewish law. This issue has received considerable attention from Muslim as well as Western writers. Notable among them are Fuat Sezgin, Nabia Abbott, and A'ẓami. These scholars have tried to show that Schacht's thesis is wrong. Many Western scholars, however, still cling to the original thesis formulated by Schacht and those before him.

[3]Schacht, *Introduction*, 60.

[4]This conclusion was drawn by Schacht. He says: "When the Umayyads were overthrown by the 'Abbāsids in 132 of the hijrah (A.D. 750), Islamic law as we know it had acquired its essential features; the need of the Arab Muslim society for a new legal system had been filled," Ibid. 49.

[5]These conclusions were drawn by a number of Western scholars.

1. That there is a common legal theory, also referred to as the classical legal theory. This theory, it is claimed, did not have anything to do with the development of the substantive law found in the *fiqh* manuals, because the main features of the law as we find it with us today were developed by the year 132 of the Hijrah. This law was subsequently recorded in the manuals compiled by Muḥammad al-Shaybānī (d. 189 A.H.) to be followed by the writings of al-Shāfi'ī and *al-Mudawwanah al-Kubrā* of the Mālikī school. In addition to these, Imām Mālik had compiled his *al-Muwaṭṭa'*. The legal theory referred to as the classical legal theory or *uṣūl al-fiqh* was refined and finalized much later, because it is not the same theory as that expounded by al-Shāfi'ī. The claim, therefore, is that as the law was developed earlier, while the theory to develop the law was finalized later, this common legal theory or the classical theory, also known as the discipline of *uṣūl al-fiqh*, has nothing to do with the law itself.

2. That the earlier jurists used personal opinion (*ra'y*) and, therefore, did not have a determined methodology for the derivation of the law. They relied on Umayyad practice and some forms of analogy. As the jurists employed analogy and not the analytical method, the law they had developed soon became rigid. This characteristic is also reflected in Roman law developed by the jurists.[6]

3. When the law became rigid, the changing needs of the state were not met. As a result of this, the state developed its own institutions that had nothing to do with the *sharī'ah*. The Orientalists call these the extra-*shar'ī* laws. In other words, the laws and institutions developed by the state, as distinct from

[6]The idea that Islamic law was a jurist's law relying upon analogy was first indicated by Max Weber. Schacht adopted this idea and developed it further. This is erroneous as we have shown during the study of the Ḥanafī theory under the title of "Theories of General Principles" in chapter 10. The Ḥanafī theory used the analytical as well as the analogical methods for the derivation and systemization of the law. The claim about the use of *ḥiyal* for bridging the gap between theory and practice is also incorrect. This idea was first presented by Goldziher and subsequently adopted and refined by Schacht, who undertook extensive research on the discipline of *ḥiyal*. Despite his efforts to study the *ḥiyal*, Schacht failed to understand their nature, as is pointed out by some Western scholars like Fitzgerald and Coulson. A short explanation about the *ḥiyal* is to be found in the appendix to this book.

the theoretical law of the jurists, were deemed to be secular in nature by the Orientalists.

4. The Orientalists, therefore, see the legal activity of the Islamic state progressing through two conflicting or antagonistic spheres. On the one hand, there was the law of the jurists that had become rigid and was developed in theory. This law, they maintain, often developed in political opposition to the state. The state, on the other hand, developed its own institutions and laws to meet its needs. These two conflicting spheres continued to move away from each other with the result that the gap between theory and practice widened.

A question that may be raised here is about the claim of the Orientalists that many of the traditions in *hadīth* literature are apocryphal in nature. This question concerns the statement that the jurists relied upon Umayyad practice. By this they mean that most of the traditions draw upon the practice of the government during this period and indirectly become a basis for the law. Umayyad practice, it is maintained, drew upon the materials and institutions of Roman and Jewish law. This point has not been taken up in this study as it has been adequately explained by scholars like Fuat Sezgin and A'ẓamī, as well as by Nabia Abbott.

The impact of this theory may now be gauged. It implies that the Muslim state never followed the theoretical law of the jurists, but adopted its own secular laws. The law of the jurists was, therefore, confined to the area of the *'ibādāt* and a few matters of personal law. In short, the part of the law that is being followed today by Muslim minorities in non-Muslim countries and even in some secular Muslim countries. Further, the law of the jurists was not developed through the methodology that is laid down in *uṣūl al-fiqh*, rather it was based on traditions that in turn were based upon early Umayyad practice. The discipline of *uṣūl al-fiqh* is, therefore, a theoretical discipline having nothing to do with the law itself.

The present study has discussed these matters at some length and has shown that such claims were misfounded. After beginning with the two major themes, we have attempted to explain the structure of the law. This was followed by an explanation of various theories of interpretation and their relationship to the derived law. The role and function of each theory was pointed out. In the context of this explanation, it was pointed out that although the spheres of the jurist and the state appear to be different in Islamic legal history,

these spheres are not not in mutual conflict. On the other hand, they pertain to the unique design of the Islamic legal system as indicated by the wider doctrine of *ḥadd*. The jurists had a specific role to perform and they performed it well. The state had its own duties to perform within the legal sphere. In certain periods the Muslim rulers fulfilled this duty to the best of their ability, while in others they did not perform admirably.

We may now look at the results arrived at during this study. These results not only throw light on the nature of the Islamic legal system and its structure, but also point to the direction that the Muslims may adopt in the development of their law.

We commenced this study with two major questions. The first question was whether there is a common theory of Islamic law? Second, whether there was a separation between the law derived by the jurists and the legal activity of the Muslim state? In response to these questions, our study revealed the following results:

1. That there is no such thing as a common legal theory in Islamic law. A common legal theory is a figment, in the main, of Joseph Schacht's imagination. When there is no common theory, it obviously cannot have anything to do with the substantive law. It is the individual and independent theories of the schools of law that are interlinked with the substantive law, irrespective of this law being derived prior to the year 132 of the *Hijrah* or later.

2. That the writing of a book on legal theory in no way indicates that there was no methodology of interpretation that the earlier jurists followed, that is, prior to the writing of such a book. It was pointed out that there are two approaches to the derivation of a legal theory. The first is to analyze and study the work of well known jurists and judges and to identify the methodology that they followed. This was the method adopted by the Ḥanafī school as many of the well known jurists of those times were also judges or *qāḍīs*. It is also the method followed by legal philosophers of the major legal systems of the world today. The second method is to lay down rules of interpretation and to make it binding for the jurists and judges to follow those rules during adjudication and the derivation of the law. The second method was followed by Imām al-Shāfi'ī, who prescribed such rules in his book *al-Risālah*, as well as elsewhere. Both approaches can have much in common, and one method cannot

be said to be better than the other, nor does one imply th absence of the other.

3. There is not one but several theories of Islamic law, and by th we mean several systems of interpretation. Each of these sy tems is highly developed and is analytically consistent withi itself. The early systems can be classified under two main met ods. The first method is inclined more toward the derivatio of the law through general principles and is based upon th analytical rather than the analogical method, contrary to wha Schacht has stated, though it also employs analogy. The secon method is a method of strict interpretation, and it gives pre erence to the literal meaning of the texts of the traditions ove the general principles emerging from the texts. Thus, it insist on tying every derived law to its evidence (*dalīl*) and ensure that this should also appear to be so. By this we mean that th former method employing general principles also insists upo tying the law to its legal evidence in the sources, but it may no always appear to be so to the layman, who is not well verse in the legal reasoning employed.

4. The method or theory employing general principles was fol lowed by the Ḥanafī jurists. The Mālikī school has many fea tures that are similar to those of the Ḥanafī system of interpre tation. This system of interpretation, being based upon flexibl general principles derived from the texts, led to the rapid de velopment of the law in the early stages of the legal system The law derived on the basis of this system is followed by th Ḥanafī school. It is, therefore, incorrect to say that this metho did not have anything to do with the law. The reason is tha this method has been derived by later Ḥanafī jurists from th derived law itself, that is, from the cases settled by the Imām of this school. It is significant that this method is followed b the legal philosophers all over the world today.

5. The adoption of general principles emerging from the texts and their occasional preference over the literal meaning of the texts had led some laymen to assume that law was based upon *ra'y* (personal opinion). The use of *ra'y*, as distinct from its literal connotations, is nothing more than the following of general principles derived from the texts of the Qur'ān and the *Sunnah*. As a result of this misfounded assumption of laymen a

controversy arose about judge made law and the literalist approach. Such controversies are found in legal systems to this day. This gave rise to the movement of the Ahl al-Ḥadīth.

6. Imām al-Shāfi'ī tried to find a middle course between these two views, and laid down his theory of interpretation in his book *al-Risālah*. His theory was much more strict, as compared to that of the Ḥanafīs, insofar as it tried to stay close to the literal and apparent meaning of the texts in preference to the general principles. This theory was modified somewhat by the later Shāfi'ī jurists. This modification by the later jurists was accomplished over a period of two centuries. The main changes introduced by them were made in al-Shāfi'īs views on *ijmā'* and in his methods of analogy.

7. Al-Shāfi'ī's theory was followed by an even more strict theory. This was the theory propounded by the Ẓāhirīs, who rejected analogy, and upheld the adoption of the literal meaning of the texts. A later theory was attributed to Imām Aḥmad ibn Ḥanbal by his disciples. His views were more or less similar to those of al-Shāfi'ī, except that he would prefer the literal and apparent meanings of weaker traditions to the implications of analogy.

8. The views of al-Shāfi'ī and Imām Aḥmad ibn Ḥanbal can be classified under the strict theories of interpretation, along with those of the Ẓāhirī school that disappeared from the scene after initial success. Here it may be said that al-Shāfi'ī used his own theory to develop the law in his book *al-Umm*. It cannot, therefore, be said that his theory did not have anything to do with the law, as claimed by Joseph Schacht.

9. The methods laid down in each of these theories are equally valid ways of deriving the law, and are deemed as such by the Muslims following the Sunnī schools. Each school still follows its own method, but respects the views of the other schools as well as their right to follow their own method.

10. By the end of the fifth century Hijrah, Imām al-Ghazālī came up with a somewhat new theory based upon the purposes of law or the *maqāṣid al-sharī'ah*. He did not claim that it was a new theory, but to anyone studying it deeply it would be obvious that it has some new features that entitle it to have a

place among the well known methods of interpretation of th other *imāms*. He borrowed methods from each of the earlie *imāms* and incorporated them in his theory. Perhaps, it wa this that led Joseph Schacht to conclude that legal theory ha nothing to do with the derived law. In other words, he equate the entire discipline of *uṣūl al-fiqh* with al-Ghazālī's theory. This would be an erroneous assumption, because al-Ghazālī' theory has not been put to practice as yet. It was designe with an eye on the future and on the role of the ruler (*imām*) Al-Ghazālī's theory will have much to do with the law of th future that is developed by Muslim states in the present age.

11. The separation between the legal activity of the state and th writings of the jurists does not follow the pattern assumed b Western writers. The jurists were concerned with the eterna part of the law that could be derived directly from the texts This law would be applicable whether the state was Islamic o one where a small Muslim minority lived. It was a law tha dealt mostly with worship and personal matters like marriage divorce, and inheritance. The jurists also derived the law per taining to some criminal penalties, because these were explicitl mentioned in the texts, and it was their duty to derive this la and ensure its implementation wherever this was possible. Th jurists left the rest of the law for elaboration by the rulers who were to derive it according to specific methodology an for whom they stipulated that they be full *mujtahids*, that i persons able to derive the law independently. The area of th law entrusted to the ruler was not mentioned explicitly in th texts. It was to be derived from the general principles emerg ing from the texts and was expected to change with change i circumstances. This idea was illustrated through the image o a growing tree in the earlier chapters.

12. The methods of interpretation advocated by the earlier school were suited to the function of the jurists by exercising whic they derived the law that was available through the texts, ei ther explicitly or implicitly. The area in which the rulers ha to make the law was an area where specific texts would no be available, except in rare cases. The rulers were in need o

[7]If he did, then, it would mean that he could not distinguish between the wor of al-Shāfi'ī and al-Ghazālī, because he attributes everything to al-Shāfi'ī.

general principles and Imām al-Ghazālī laid down a detailed methodology for them through which they could derive, refine, and apply the general principles of Islamic law found in the Qur'ān and the *Sunnah*.

13. In different periods, Muslim states did make laws within their own sphere, while in other periods there was little development. The activity of the state did continue, however, during the Ottoman times in Turkey and during the days of Awrangzeb 'Ālamgīr in India. The Muslim world was then subjugated by the colonial powers and the remnants of the institutions established by the state disappeared. It is, therefore, not correct to say that the *fuqahā'* did not develop the law and succumbed to *taqlīd*. The *fuqahā'* did develop the law and refined it within the area of their jurisdiction. The remaining areas were the responsibility of the state.

14. The role of the jurists and the rulers is, therefore, visualized in the form of two cooperating spheres, where one sphere is fixed and governs the other sphere that is flexible, changing with the times.

15. Islamic states today, more than ever, are in need of discovering and deriving the general principles found in the Qur'ān and *Sunnah*, in the light of which they can develop their law. The methodology for finding these principles has been described in detail by Imām al-Ghazālī.

From the foregoing results we can see that the role of the jurists and that of the rulers was clearly defined from the earliest days of Islamic law. The jurists focused on that part of the law that was derivable directly from the texts, because it was either explicitly stated in the texts or could be derived through strict methods of interpretation. The rulers generally dealt with new situations using the general principles of the *sharī'ah* available in the Qur'ān and the *Sunnah*. The separation between the activity of the state and the writings of the jurists was intentional, because of the structure of Islamic law and the design of the Islamic legal system, and it was carried out under the principle of separation of functions in a spirit of cooperation. There was not one but several theories for developing the law within the domain of the jurists, and each of these theories was used to develop the law of a certain school. The new theory,

or ideas, advocated by Imām al-Ghazālī were for the benefit of th rulers, who were to derive general principles and apply the law t new situations in the ever-changing sphere.

This, in simple terms, is the theory of Islamic law that emerge from our study. It is presumably not perfect. It does, however, at tempt to explain the growth, structure, and nature of Islamic law i a way that avoids contradictions. One point that stands out in thi entire study is the need of a methodology for the discovery and appli cation of general principles of Islamic law. How are these principle discovered and what are their different categories? Providing answer to these questions was a major goal of this study. We now turn, onc again, to the ideas of al-Ghazālī to see what these principles are an how they may be discovered.

14.2. The principles of Islamic law

In the second part of this book, while discussing the methodology o the Ḥanafī school, an explanation was provided about the meanin of the term "principles." It would be helpful to recall what was sai there. Roscoe Pound, while elaborating the idea of law according t the analytical jurists, said that it contains three elements: a precep element, a technique element, and an ideological element. By precep four things are implied: rules, principles, standards, and conceptions A rule is a legal precept attaching definite detailed legal consequence to a definite detailed set of facts. This is the earliest type of precep and the provisions of the Penal Code, for example, would contai many rules. A conception is a legally defined category into whic cases may be fitted in order to facilitate the application of a series o rules and principles, for example, sale, bailments, trusts, and so on A standard is a measure of conduct prescribed by law from whic one departs at his own peril. The standard of due care is an example A principle, on the other hand, is an authoritative starting point fo legal reasoning from which we seek grounds of decision by deduction Principles are the work of lawyers. They organize the experience o interpreting and applying the rules. In modern law, principles ar said to come into operation in "hard cases." These are cases wher the text of the statute fails to provide a direct answer. The judge in such a case, would search for a general principle that would cove the particular set of facts. Melvin A. Eisenberg explains principles a follows:

> When principles and rules are conceived in this way, principles may seem as explanations for rules, in the sense that we commonly invoke general propositions to explain those that are more specific. However, the force of principles is not merely explanatory. Principles, like rules, are binding legal standards, and often determine results without the mediation of rules.[8]

In the English common law, principles are laid down in ancient decisions. These principles have been refined over the ages in later judgements. Whenever a judge needs a principle, he looks for it in the decisions of the courts. In the case of Islamic law, general principles as well as rules are laid down in the Qur'ān and the *Sunnah*.

The Ḥanafī jurists, who used general principles, either found them stated explicitly in the texts of the Qur'ān and the *Sunnah* or they constructed these principles around the general words bearing the *aḥkām*. These jurists would also formulate principles after analyzing a large number of similar rulings. Thus, al-Dabūsī states: "The world according to us (Ḥanafīs) is divided into two parts, while according to al-Shāfi'ī it is one and indivisible."[9] This is a general statement that means that the Ḥanafīs distinguish between the *dār al-Islām* and the *dār al-ḥarb* for purposes of the criminal law, while Imām Shāfi'ī does not. A large number of cases are settled according to this principle.

Al-Ghazālī converts the discovery of the general principle into a theory. He states that principles are of three kinds, and each of these is discovered in a defined way:

1. **Principles stated explicitly in the texts:** The first category of principles are those that are stated explicitly in the texts of the Qur'ān and the *Sunnah*. These are like the principle about the prohibition of *ribā* emerging from a Qur'ānic text, as well as its supplementary principles stated in the traditions. This was discussed in the methodology of the Ḥanafites in the previous chapter. The principle stated in the text of the Qur'ān is read by the jurists as implying: "All sales are permitted, except those bearing *ribā*." Another example from the traditions is that "eligibility for profit is based on a corresponding liability for bearing loss."[10]

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[8] Melvin A. Eisenberg, *The Nature of the Common Law*, 76–77.

[9] Al-Dabūsī, *Ta'sīs al-Naẓar*, 58.

[10] *Al-kharāj bi al-ḍamān*.

He calls these principles the *mu'aththir munāsib* principles, because they are stated in the texts and the underlying causes assimilated under them conform with the purposes of the law. In fact, the purposes of the law have been derived from such principles. As these principles are stated in the texts, they are to be followed even when they do not conform with the purposes of the law; they are still effective (*mu'aththir*), because they have been explicitly mentioned in the texts. The number of principles stated explicitly in the texts are many, but limited nevertheless.

2. **Principles derived from the underlying *ḥikmah* of the texts:** The second category of principles are derived principles. This category of principles has been called *mulā'im* by al-Ghazālī. The *mulā'im* is a principle that has been derived directly from the texts. This means that it is not explicitly stated in the texts, but is derived from the *ḥikmah* related to an underlying cause (*'illah*).

   In a hypothetical example discussed within the theory of the purposes of law, we derived a broad principle from a rule that was specific to a set of facts. This was the underlying cause of "minority," which was first generalized to yield the category of "inability (*'ajz*)."[11] Through this the *ḥukm* of guardianship was extended from the minor to all those persons who were unable to look after their own affairs. The insane person was, therefore, covered by the principle. This was further generalized to yield the principle of "necessity (*ḍarūrah*)." The *ḥukm* of guardianship was extended in the case of financial mismanagement to apply to other cases. Here we said that this principle would today justify the appointment of receivers or managers for corporations in difficult straits, when the money of the public was involved.

   These generalized categories are no longer specific underlying causes, but are flexible general principles. The distinction is that the underlying cause is always something stated or indicated in the texts, while the generalized principle is not explicitly stated, though it may be obvious. The underlying cause is more like a rule, while the derived principle is its explanation. In the example provided above, "minority" is not the real

[11] See Ṣadr al-Shari'ah, *al-Tawḍīḥ*, ii, 572.

reason for extending the *ḥukm* of *wilāyah*; it is, in fact, the inability of the minor to give a legally valid consent. We, therefore, move one level up and determine "inability to consent" to be the cause.

This brings us to the second attribute. The generalization at this level is based on the *ḥikmah* (wisdom) behind the text. The attribute of inability to consent is, therefore, a kind of explanation for the *'illah* of minority. Such a cause is avoided in strict analogy because it is not very stable for certain cases. For example, if the cause of inability permits us to extend the *ḥukm* of *wilāyah* to the *ma'tūh* or a somewhat retarded person, who is not a minor, the cause may not hold true for all such persons, depending on the intensity of the handicap. If the cause is generalized at a still higher level, we arrive at the attribute of "necessity,"[12] and this enables us to extend the *ḥukm* to the *safih* (prodigal, spendthrift). When this person is not a minor, there might be some injustice involved if he is not allowed to do what he likes with his fortune. The derived principle may, therefore, require the jurist to focus on the result of his *ijtihād*, and not on the derivation of the correct cause alone.

The relationship between the specific rule, that is, the *'illah* and the general principle that is based on the *ḥikmah* (wisdom) may be explained through Eisenberg's statement quoted two pages back, where he emphasizes that "when principles and rules are conceived in this way, principles may seem as explanations for rules, in the sense that we commonly invoke general propositions to explain those that are more specific.".[13]

In exactly the same way the principles based on *ḥikmah* are considered as binding law, and not mere explanations, in al-Ghazālī's theory. He insists, however, that such generalized rules can be applied only if they meet two conditions. First, that these principles should conform with the purposes of the law, that is, they should be *munāsib*. Second, they should not clash with the general practices of the law, that is, they should be consistent with the rest of the law. This is what is meant by being *mulā'im* in al-Ghazālī's terminology: It is the analytical consistency and compatibility with the rest of the general

[12] Ibid. 573.

[13] Eisenberg, *The Nature of the Common Law*, 77.

principles of the law. Al-Ghazālī's purpose in stipulating these two conditions of *munāsabah* and *mulā'amah* was to restrict the uncontrolled use of the *ḥikmah* for the derivation of the principle. The possible implication was that these conditions will make an unstable cause based on the *hikmah* more stable and in tune with the rest of the law.

The number of these broad *mulā'im* and *munāsib* principles can be as much as the underlying causes determined by the texts or much more.

3. **The principle introduced by the jurist:** This type of principle is the *mursal*. It is a principle that is not derived from the texts by generalization, but seeks its authenticity through *munāsabah* and *mulā'amah*, that is, it conforms with the purposes of the law and is consistent with the rest of the law. These conditions are expressed by al-Ghazālī in a somewhat different way:

   - The principle derived by the jurists should not be *gharīb*, that is, alien to the law. It should conform analytically with the other propositions and principles of the law.
   - It should not clash with the *naṣṣ* (text)
   - It should not attempt to alter the implications of the texts, that is, the general propositions and the principles of the law.

   The details pertaining to this type of principles and their conditions were explained earlier. It can be seen that the number of these principles will be unlimited depending upon the genius and ingenuity of the judge and lawyer.

Out of the three categories mentioned above, the conditions stipulated by al-Ghazālī apply to the last two. The first of these conditions is that the principle should not clash with the rest of the propositions of the law (*taṣarrufāt*). By this he means other general principles. This is achieved by the jurists when he checks the derived principle for analytical consistency with other principles. These other principles have to be the principles of Islamic law and not those of English common law or some other law.

The second condition is that the principles should conform with the purposes of Islamic law. In the previous chapters a detailed ex-

planation is provided about the operation and structure of these purposes. The derived principle must not seek to convert the priorities determined for the purposes or to subvert the interests they seek to secure.

14.3. The Scope of *Ijtihād*

Ijtihād is not a source of law; the sources in the true sense of the term are the texts of the Qur'ān and the *Sunnah*. It is an activity, a struggle, a process to discover the law from the texts and to apply it to the set of facts awaiting decision. There are some who believe that the law laid down in the texts is different from *ijtihād*, which they consider to be the activity of the jurists outside the texts. This is incorrect. Whatever the jurists have said has been derived from the texts through the methods of interpretation that we have been talking about in this book. These methods taken together form the system of interpretation that the jurist follows, and his activity or effort to discover the law from the texts is called *ijtihād*.

The first restriction that is placed on this activity is: There is no *ijtihād* within an explicit rule in the texts (*lā ijtihāda ma' al-naṣṣ*). This implies that when the rule stated in the texts is so clear that more than one meaning cannot be derived from it, the jurist is prohibited from undertaking *ijtihād* in it. The examples of these are: the word "hundred stripes" or the words "cut off their hands." Here the words hundred has a single meaning, but the word stripes may be subject to interpretation. Hundred cannot be converted to two hundred. However, one may ask: what kind of stripes are intended here with respect to the instrument used, the intensity of the stroke and so on. In the cutting of the hands, the *ḥukm* is clear that hands are to be cut, but what is the exact meaning of the term *yad*, which may extend from the elbow to the fingers, and whether the left hand is to be cut or the right. Again, there may be questions about the thief and about the value of the property stolen. These questions are first answered on the basis of the texts themselves, that is, through the Qur'ān and *Sunnah*. If a meaning is given in these texts, it becomes the legal meaning and is to be followed, irrespective of its conformity with the literal meaning of the word. When no explanation is available, the jurist looks for literal meanings and uses his own reasoning and judgement to arrive at the appropriate answer. In this case the literal and technical meanings would be the same.

All texts that are subject to interpretation or admit of interpretation are the object of the activity known as *ijtihād*. The first method used by the jurists, as explained earlier, is that of literal interpretation. We may refer to it as the first mode of *ijtihād*. When the set of facts awaiting decision is not covered by literal meanings and implications, the jurist undertakes analogy. The form of analogy used here is very strict and goes by the name of *qiyās al-'illah*. This entails the extension of the meaning to a new case from a single text of the Qur'ān or the *Sunnah* with a specific meaning on the basis of a common underlying cause. We may call this the second mode of *ijtihād*. In case this method of extending the *ḥukm* does not solve the problem, the jurist undertakes the extension by considering the texts collectively, that is, by looking at the spirit of the laws. This is the area that has been described by al-Ghazālī in his theory, and that we have been discussing above with respect to general principles. The jurist uses the general principles of the law by referring them to the *maqāṣid al-sharī'ah* and checking them against these purposes. We may call this the third mode of *ijtihād*.

For the first two modes, it is necessary that the jurist know the Arabic language, the science of *uṣūl al-fiqh*, as well as the texts. Imām al-Shāfi'ī laid down conditions for such a jurist, and these conditions are not impossible to fulfill. For the third mode of *ijtihād*, writers like al-Shāṭibī are lenient, and they maintain that it is possible for a person to derive the law through the *maqāṣid al-sharī'ah* even if he does not know the Arabic language, because meanings are conveyed by the principles themselves. It is suggested, however, that the derivation of the law entails a heavy responsibility, and it is better if the person interpreting the law is well qualified.

In the previous discussions we have conceived the structure of Islamic law in two cooperating spheres. The first sphere falls within the domain of the jurist, while the second is within the jurisdiction of the ruler. The main question that we would like to raise here is whether there is any need for further *ijtihād* in the area that has already been settled by the jurists? To be more specific, is there any need for *ijtihād* and the derivation of fresh rules in the area of the *'ibādāt*, in the area of inheritance, in the area of marriage and divorce, or in the area of the *ḥudūd* penalties? This question is somewhat difficult to answer, and it would be better to consider these case by case. In the area of the *'ibādāt*, almost everyone would agree, that there is little need for further *ijtihād* and what the *fuqahā'* have decided what is to be followed. In the sphere of the law of inheritance

too the decisions arrived at by the *fuqahā'* seem, on the whole to be definitive, though some would say that the assigning of half a share to a woman should be reconsidered, as was done in the case of the predeceased child of the *propositus*.[14] The answer to this is that this is not a moot point. The texts clearly state that the share of the male is twice the share of the female. The first restriction mentioned above applies here, because there is no *ijtihād* in the case of a specific rule. It would be better to look into the entire philosophy of the law of inheritance as well as family law to determine and understand why the Lawgiver has divided the shares this way. The bulk of the other laws derived by the jurists need no change, and the work of the jurists spread over fourteen centuries may scarcely need alteration. A few issues that trouble some pertain to administrative matters, which can be settled by the rulers under his administrative or *siyāsah* jurisdiction.

Calls for *ijtihād*, therefore, must focus upon the area of the law that falls within the domain of the rulers and this pertains to the bulk of the law obtaining in countries like Pakistan. In other words, if the law is based upon English common law, it needs to be converted and changed according to the general principles of Islamic law. This is the area to which we may turn in the next chapter.

[14] See §4 of The Muslim Family Laws Ordinance, promulgated in Pakistan in 1961.

Chapter 15

The Modes of *Ijtihād*

There are three modes of *ijtihād* undertaken by the Muslim jurists. This was stated in the previous chapter. The first mode corresponds with literal interpretation where the jurist stays as close to the meaning of the texts as is possible. The purpose is to discover the true intent of the Lawgiver. The strict theories of law described earlier are ideal for this mode. However, the Ḥanafī theory based upon general principles provides greater flexibility even in this mode. In the second mode, the jurist attempts to extend, through analogy or *qiyās*, the laws derived during the first mode to new situations not expressly covered by the texts. The form of analogy employed by Muslim jurists is strict, and some of its forms are very similar to literal methods. This was explained in the earlier chapters. *Qiyās*, employed by Muslim jurists, is not to be confused with analogy practiced in Western law, which has a much looser form. The third mode of *ijtihād* comes into play when the set of facts awaiting decision is neither stated expressly in the texts nor can one of the laws derived in the first mode be extended to this new situation through analogy. In such a case, the jurist employs the theory of interpretation based upon the purposes of law. The essential difference is that in analogy the jurist solves the legal problem by extending the meaning from a single text, while invoking the purposes or the spirit of the laws means looking at all the texts or a group of texts collectively in the light of their purposes. In this mode, the jurist is required to work on the basis of general principles of the law when these principles conform with the purposes of the *sharī'ah*.

There are some cases in Islamic legal history from which the jurists derived inspiration to formulate their theory about the purposes

of law. Nevertheless, the third mode of *ijtihād* has not been employed very frequently by the *fuqahā'*. The reason is that this mode of *ijtihād* is meant to be exercised by the *imāms*, that is, the rulers, who deal mostly with public law rather than personal law, and who usually employ the general principles of the *sharī'ah* to frame the laws or to provide relief.[1]

These methods of interpretation, in their refined form, were not available to the jurists right from the first day, even if the methods are based on early precedents. Legal theory evolved slowly, as has been shown in the three broad trends traced in the second part of this book, to emphasize the need and use of general principles within the framework of the purposes of law. These methods lay dormant during the greater part of the colonial period, but are today waiting to be employed, refined, and extended by Muslim judges and lawyers.

Today, the situation in the Muslim countries has become very complex. If we could, for example, identify with ease the role of the jurist as distinct from his judicial function and further distinguish it from the role of the ruler in the earlier days, it is not possible to do so today, because the state has acquired a complete monopoly of law-making; the only exception perhaps being the area of *'ibādāt*. Even in this area, subjects like *zakāh* fall within the domain of the state. In addition to this, the modern state is required to regulate areas that were not even known to the earlier states. In short, the need for flexible general principles is immense. In Pakistan, where English common law is still applicable, significant progress has been made in the Islamization of the legal system, however, a systematic and internally consistent methodology for the discovery and application of Islamic law is yet to emerge. We see various strategies in operation all at once. It would be instructive to analyze very briefly, in the light of our study in the previous chapters, the strategies for Islamization being pursued in Pakistan. In doing so we will also refer to the strategies that are proposed, but not followed.

[1] When we talk of the *imām* in the present context, we mean thereby all the law-making institutions as well as the courts, because in Islamic law all *qādis* derive their authority from the *imām* and exercise it on his behalf.

15.1. Strategies of Islamization

15.1.1. The general approach in Pakistan

In Section 4.4 of Chapter 4, we discussed the approaches to legislation and lawmaking where the texts of the *sharī'ah* have not expressly laid down a rule. There we mentioned two broad approaches. The first approach required that whatever is expressly prescribed in the *sharī'ah* by way of commission or omission is to be followed and the remaining laws are to be considered as permissible or *mubāḥ* under the principle that "the original rule for all things is permissibility." This approach is attributed by jurists to the majority schools and even some Ḥanafī jurists have used it for specific cases.

The second approach requires that all things be considered prohibited, unless their permissibility is justified on the basis of specific or general principles of the *sharī'ah*. In other words, each and every provision of the law must be shown to be valid according to the *sharī'ah*. This approach is attributed to the Ḥanafī school. In the present day terminology, we would say that justification through principles of Islamic law is required by the first approach only for the "occupied field." The second approach requires that justification on the basis of general principles must be provided for the "occupied" as well as the "unoccupied field."

It appears that the first approach is being followed in Pakistan. The general practice is to strike down the offending laws as being repugnant to the principles of the Qur'ān and the *Sunnah*, leaving the bulk of the laws intact. Thus, for example, the promulgation of the *Ḥudūd* Ordinances led to new provisions and also caused some of the provisions of the Penal Code to be repealed.[2] The bulk of the penal code is still intact and has not been affected; likewise, the Criminal Procedure code. The assumption is that the remaining provisions were not found to be repugnant to the texts of the Qur'ān and Sunnah. The same can be said of the law of evidence and many other statutes. The remaining statutes are undergoing the same process. This is not to say that this assumption is incorrect, because all these laws have been carefully reviewed. The problem is that many of these laws contain within them concepts that represent "the ulti-

[2] Additional sections will be repealed by the new law of retaliation (*qiṣāṣ*).

mate ideas of Western civilization,"[3] and we can never be sure ho they conform with the *sharī'ah*.

The second approach would require that even if the existing pr visions of these statutes are not found to be repugnant to the tex of the Qur'ān and the *Sunnah*, they must be shown to be so. Ea and every provision of the law must be justified on the basis of t general principles of the *sharī'ah*. It must be shown how and wh a general principle governs a rule laid down in the statute. This, course, is a gigantic task and will take much longer.

Why is the second approach to be preferred? The reason is that i the case of the provisions that are expressly declared to be Islami like the provisions of *ḥadd* in the *Ḥudūd* Ordinances, it is obviou what the governing principles are. In case of doubt, recourse ca always be had to these general and governing principles for arrivin at the right decision. In the case of the provisions left intact, t governing principles are those of the English common law. The principles are to be found in the decisions of the courts. Whenev the judge is faced with a "hard case," according to the terminolog used by Ronald Dworkin, or he is dealing with the "open textu of the law," according to the description provided by H.L.A. Har the judge will always have recourse to the principles of the Englis legal system, because these principles determine the purpose an scope of the provision applied. Further, these principles are readil available and it is easy for the judge to have recourse to them. Eve when the judge wishes to employ the principles of Islamic law, h will have to undertake extensive research himself, or he will have t go through the lengthy process of consulting experts. On the oth hand, if the law has already been explained and justified in term of the principles of Islamic law, the judge will find it easy to giv new meanings to the statutory provisions. Justification of all th provisions of the law in the light of the general principles of th *sharī'ah* will also promote understanding of the Islamic legal syste and lead to further development.

The proposal, therefore, is that we should stop thinking in term of converting only five percent of the laws that are found to be repu nant to the texts of the Qur'ān and the *Sunnah*. These five perce laws must be converted, but the remaining ninety-five percent mu be shown to be valid in terms of the general principles of the *sharī'a*

[3] Jerome Hall, *General Principles of Criminal Law* (New York: Bobbs-Merr Co. Inc, 1960) vi.

It may be said here that justifying the remaining part of the law in terms of the general principles of the *sharī'ah* is not the responsibility of the law-proposing or law-framing institutions; rather it is the task of the judges, lawyers, and law teachers. Judges should start using the principles of Islamic law in elaborating upon the provisions of the statutes; lawyers should assist the courts in understanding these principles; and law teachers should support both judges and lawyers by writing treatises and commentaries explaining each provision of the law. This is true. It is the responsibility of these three groups of persons to expound the law and its principles. Yet, questions of methodology are as important as the law itself. A proper methodology ensures analytical consistency and avoids resource-wasting contradictions in the law. It would be much better if the Council of Islamic Ideology, the institution responsible for the Islamization of the legal system, were to explain and publish its legal reasoning for each provision that it formulates or proposes. It is obvious that the Council undertakes extensive research on each provision, but it does not publish its reasoning, nor has it ever thrown light on the theory of interpretation it employs. If the Council were to do this, a great service would be rendered to the legal community, who would be able to understand the laws framed in depth. This will also enable the Council to obtaining feedback from the lawyers or scholars and a continuous process of refining and reforming the law would be set in motion. The work of the Council should be supported by the Islamic Research Institute. The Institute should publish extensive commentaries on the law promulgated as a result of the efforts of the Council. Further, the Institute should also arrange to publish commentaries on the provisions that have been retained unchanged in the law. These commentaries would obviously be undertaken in light of the general principles of the *sharī'ah*, explaining what principle underlies which provision. The Institute has done considerable work on the law, but it is the provisions of the existing law that need immediate attention. The truth is that the Islamic Research Institute is perhaps the only body in Pakistan that has the resources to undertake this gigantic task.

15.1.2. Codification

It has been suggested that the entire law should be re-codified in the light of the injunctions of the Qur'ān and the *Sunnah*. Partial exercises of this nature have been undertaken in Egypt. In our view,

this strategy is not likely to prove very fruitful, because the real need of the judges is for the general principles in the light of which the meaning, purpose, and scope of each provision is determined. This can be done with the existing provisions, as suggested in the previous section. Once the judges of the superior courts start using the general principles for interpreting the statutes, the existing provisions will automatically acquire new meanings. Further, codification of the law afresh will lead to uncertainty in the law. Certainty is an essential and acknowledged characteristic of the law. It helps the lawyer to predict for his client how the court will decide a matter, and the client acts or decides accordingly. If such predictions become uncertain, people are likely to face considerable hardship.

15.1.3. Applying the unwritten Islamic law

It has sometimes been suggested that the fastest method of Islamization is to treat the entire law as unwritten and to require the judges to decide cases through the unwritten Islamic law. The argument is that this method was followed for the Islamic law itself in the early days, when no law codes enforced by the state. Further, it is well known about English common law in which the judges of Pakistan are trained. Why, then, the proponents of this view ask, is it not possible for judges today to decide according to Islamic law when a vast legal literature is available to them and there are experts who can help them through the initial phase till a considerable body of legal precedents is evolved? The main argument against this is again that of uncertainty, mentioned above. This strategy is likely to lead to chaos, thus causing extreme hardship for the people. In certain cases, as in the criminal law, certainty is an essential requirement, and its absence would amount to injustice and a violation of the principles of *nullum crimen sine lege* and *nulla poena sine lege*.

15.2. *Ijtihād* and the rule of recognition

How was the law declared as valid Islamic law in the past and how is it declared valid today? This question goes to the heart of the process of *ijtihād*. To understand this process we may quote H.L.A. Hart in the attempt to understand what he means by the rule of recognition that identifies a law as valid in a modern legal system.

According to Hart, the rule of recognition is a rule that provides the criteria by which we judge the validity of other rules. In this

sense the rule of recognition is an *ultimate* rule. This rule has two manifestations represented by an *internal* statement and an *external* statement. The external statement is made by an outsider, who views the operation of the legal system objectively. Thus, an outsider would say that "whatever the Queen in Parliament enacts is valid law." Hart says:

> The existence of this simple form of rule of recognition will be manifest in the general practice, on the part of officials or private persons, of identifying the rules by this criterion. In a modern legal system where there are a variety of "sources" of law, the rule of recognition is correspondingly more complex: the criteria for identifying the law are multiple and commonly include a written constitution, enactment by a legislature, and judicial precedents. In most cases, provision is made for possible conflict by ranking these criteria in an order of relative subordination and primacy. It is in this way that in our system "common law" is subordinate to "statute."
>
> It is important to distinguish this relative *subordination* of one criterion to another from *derivation*, since some spurious support for the view that all law is essentially or "really" (even if only "tacitly") the product of legislation, has been gained from the confusion of these two ideas. In our own system, custom and precedent are subordinate to legislation since customary and common law rules may be deprived of their status as law by statute. Yet they owe their status of law, precarious as this may be, not to a "tacit" exercise of legislative power but to the acceptance of a rule of recognition which accords them this independent though subordinate place.[4]

He means that the act of legislation, which appears to the outsider to be the sole rule of recognition, is not the only rule, and there are other rules of recognition that are operating within the system. "For the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers."[5] He compares these persons to those playing a game and the rule of recognition is like the scoring rule of the game. These people are the

[4] H.L.A. Hart, *Concept of Law*, 98.

[5] Ibid.

insiders, and it is their view of the rule of recognition that he calls the *internal* statement: "The use of unstated rules of recognition, by courts and others, in identifying particular rules of the system is characteristic of the internal point of view. Those who use them in this way thereby manifest their own acceptance of them as guiding rules and with this attitude there goes a characteristic vocabulary different from the natural expressions of the external point of view."[6]

What Hart is saying, in effect, is that the external statement maintaining that a law has been enacted by parliament is not enough for the validity of a law. The law must be internalized by the insiders,[7] the actors within the system. It is only this form of recognition that lends efficacy to a system and the law comes to be generally obeyed.

What is relevant to our discussion here is that merely enacting the law and declaring it Islamic will not be sufficient for its validity. The law must be internalized by the insiders of the legal system. The judges, the lawyers, the clients, the law-teachers, and in fact all the citizens. Once the law has been internalized, its efficacy will be ensured. This process of internalization can be accomplished when the law in the statute books is linked to the real sources, the Qur'ān and the *Sunnah*, and to *fiqh* literature. If internalization is necessary for custom and common law in the English legal system even though these are subordinate to statute, such internalization by the insiders is a must in the case of the sources of Islamic law, which have a higher status than all statutes and constitutions. The first step to ensure that the insiders believe that the law is based on these sources is to show that it is so by linking each provision of the law to its legal evidence in the *sharī'ah*, that is, to a specific rule or a general principle of the *shari'ah*.

In the Islamic legal system, the desire to ascertain what is valid Islamic law led to the development of the schools of *fiqh*. The schools brought uniformity into the law by selecting and preferring individual rules from among a large body of rules. Followers of a school were like the insiders of a legal system. They internalized the law by having faith in one school and its founders. The law within the school came to be generally obeyed. There was no act of legislation to provide validity to the law from the outsider's point of view. The follower of one school could say with certainty: "This is the law...."

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[6]Ibid. 101.

[7]This is just like the players of a game who adopt and accept the rules and play the game by those rules.

If the barriers of the schools are removed, it becomes difficult to say with certainty what the law is on a moot point, that is, on a *mujtahad fih* (which does not include those matters in which there is no scope for *ijtihād*, that is, issues that are *qaṭ'ī* having been settled unanimously and definitively). Would the law be the one followed by the Shafi'ī school or that followed by the Ḥanafī school, or any other school for that matter? This problem can be removed if the state steps in. The rule in such a case, as expounded by al-Qarāfī in *al-Furūq*, is: "When the *ḥākim* gives a ruling, all disputes vanish." Today, the state exercises a monopoly on law-making, excluding some areas of the *'ibādāt* where the law of the schools still remains operative.

Without going into the question whether the state is qualified to be a *mujtahid*, we notice that the situation is somewhat complex. In Pakistan, for example, the process of *ijtihād* is spread out between the parliament (*majlis shūrā*), the courts (including the Federal Shariat Court), and the expert constitutional bodies like the Council of Islamic Ideology and the Islamic Research Institute. The Courts or the Council apply the repugnancy test and refer the matter to the parliament for legislation. The final decision rests with the parliament. This has been reaffirmed recently in Hakim Khan v. the Government of Pakistan, PLD 1992 SC 559. We have already referred to this in an early chapter. The point to be made here is that enactment by parliament will satisfy the outward rule of recognition, the external statement. What needs to be done for the internal point of view may be stated in the words of Justice Shafiur Rahman:

> The ascertainment of the absolute principles of Islamic Law with regard to political power, its distribution and delegation and financial institutions is itself a matter requiring detailed study, thorough research and meaningful debate before acquiring concrete shape so as to be adopted as a test of repugnancy of the Constitutional provisions. It cannot summarily be done. Such an exercise can more appropriately be undertaken under the control and supervision of the legislature and the expert bodies like the Islamic Ideology Council and Islamic Research Institute.[8]

The learned Justice was referring here to the application of the repugnancy test to constitutional provisions and to the pre-enactment

[8] PLD 1992 SC 634.

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stage. We would like to say, however, that the ascertainment of the absolute principles of the *sharī'ah* with respect to the entire law, whether it has been amended after the application of the repugnancy test or whether it has been retained after passing the repugnancy test, is immense, because this alone will help the insiders, judges, lawyers, clients, citizens, to internalize the law, and be able to say with confidence: "This is the law...."

To explain the post-enactment stage, we may look at the criminal law as enforced in Pakistan. The *Ḥudūd* Ordinances have been in operation for some time. The *Qiṣās* and *Diyat* law is also in operation now. These laws can be, and are, explained in the light of the principles of Islamic law. There is, however, no exposition of the theory of crimes as yet, a theory that organizes the various principles and doctrines of the criminal law into a unified whole. There is need for such a theory so that the judges and lawyers understand how the principles of Islamic law in this area are different from those in Western law or in the English common law. In addition to this, the bulk of the penal code has been retained after passing the repugnancy test; the same can be said about the criminal procedure code as well as other related laws. What are the principles that govern this law, which has been retained in its original form? In case of ambiguity, what principles would the court use to interpret and apply this law? The obvious answer would be that they will use the same principles that they have been using up to now, that is, the principles found in the English common law. According to Jerome Hall, "[T]he principles of criminal law include many of the ultimate ideas of Western civilization."[9] There can be no doubt that it is imperative that we substitute the principles of our own civilization for these, if we have to internalize this law and add to its efficacy.

Using the principles of the Islamic criminal law is the burden of the superior courts of Pakistan, but the courts have to be assisted in this task. The Islamic Research Institute and other institutes of legal learning must undertake this task in great earnestness and provide the courts with a body of principles and doctrines that will govern the criminal law, substantive and procedural, in the future. The same can be said about other areas of the law, in fact, the entire legal system.

This, however, is easier said than done. It is a complex task and needs to be handled with care. The first thing that needs to be done is to adopt a uniform methodology. This methodology must enable

[9] Jerome Hall, *General Principles of Criminal Law*, vi.

the jurists engaged in this task to search for and derive the general principles of Islamic law with ease. Methodologies change over time, but as a starting point the methodology proposed by al-Ghazālī can be followed. This methodology requires that the general principles must be verified and checked against the purposes of the *sharī'ah*. The purposes of the *sharī'ah* are not law in themselves; they serve as the criteria for confirming the authenticity of the general principles employed by the jurist, whether these principles are stated in the texts of the Qur'ān or the *Sunnah* or have been derived from them by the jurist. In some ways, this entire book has been devoted to the explanation of this methodology.

Appendix I

The Use of *Ḥiyal* in Islamic Law

(Referred to in Chapter 8)

According to Schacht, Muslim jurists attempted to bridge the gap between theory and practice through casuistical methods. The most significant of these were the *ḥiyal*.[1] He also mentions Mālik's concept of *'amal*, *shurūṭ* and *furūq* among various devices used for bridging the gap between theory and practice, but it is obvious that he does not consider all of these as casuistry. His major emphasis is on *ḥiyal*. It was Ignaz Goldziher, in fact, who first pointed out the existence of casuistry through *ḥiyal*.[2] For him it was not a question of bridging the gap between theory and practice. He considered *ḥiyal* as "tricks" emerging from the "soul-destroying pedantry of the jurists" that were an affront to the moral and spiritual order,[3] and which impressed "upon the teachings of Islam a quibbling legalism."[4] He did consider the *ḥiyal* as an integral part of *fiqh*.[5] Schacht says they form "only part of the customary commercial law which developed, beside the ideal law of strict theory, in the Islamic countries of the Middle Ages."[6]

Schacht is the only person in modern times who undertook extensive scholarly work on the subject of *ḥiyal*. He edited three books.[7] The books are by al-Shaybānī, al-Khaṣṣāf, and Qazwīnī. Two of these were from the Ḥanafī school and one was compiled by a Shāfi'ī jurist of the fifth century Hijrah. Besides editing these books, he also wrote some articles on the subject. *Ḥiyal* are not included in the handbooks of the jurists. The only exception is al-Sarakhsī, the author of *al-Mabsūṭ*. Schacht is of the opinion that *ḥiyal* receive special separate treatment. This appears to be correct, but only for the Ḥanafī school.

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[1] See Schacht, *Introduction*, 205, 210.

[2] Goldziher, *Islamic Law and Theology*, 62.

[3] Ibid. 65.

[4] Ibid. 66.

[5] Ibid. 65.

[6] Schacht, *Introduction*, 210 (*Cf.* "The *ḥiyal*, which are not confined to commercial law but cover other subject-matters as well...." Ibid. 78. Unfortunately, such contradictory statements are widespread in the works of Joseph Schacht).

[7] See *Beitrage zur semitischen Philologie und Linguistik*, vols. 4, 5, & 6.

In any case, this does not mean that the *ḥiyal* are not an integral part of *fiqh*.

Ḥiyal literature appears to have originated with the Ḥanafites, with Abū Yūsuf and al-Shaybānī composing treatises. The other schools, as well as the traditionists, were initially opposed to the *ḥiyal*.[8] Slowly, however, the other schools started accepting the *ḥiyal*. Al-Qazwīnī, a Shāfi'ī jurist, composed his treatise with caution, dividing the *ḥiyal* into *maḥẓūr*, *makrūh*, and *mubāḥ*, with the last category forming a major part of his work. The Ḥanbalites also declared a number of *ḥiyal* to be legal.[9] Al-Shāṭibī, a Mālikī jurist, also distinguished the permitted *ḥiyal* from the prohibited on the basis of the purposes of law.[10] These schools declared the *ḥiyal* to be legal and came to accept them for a definite legal purpose, which was not the bridging of the gap between theory and practice, though every law and every rule does add something to practice.

A careful examination of the *ḥiyal* literature reveals their close relationship with *shurūṭ* (conveyances). They are merely procedural devices advising people to be careful in making contracts and framing legal statements. Their purpose is not to evade the law, but to avoid clashing with it due to carelessness. For example, if a man wants to threaten his wife with divorce, but does not actually want to divorce her; his statement, "I will divorce you if you do this," will take effect according to Ḥanafī law if the woman is adventurous enough to commit that act, and she will stand divorced. The *ḥīlah* for the man is to add "God willing" at the end of his statement.[11] The use of this formula can be traced to traditions from the Prophet related to other types of oaths. There are many *ḥiyal* that belong to this category. Of course, there are some that are highly complex.

The *ḥiyal* are not "tricks," but precautionary devices. This is recognized by Schacht when he says: "The concept of 'precaution' dominates the literature of *ḥiyal* and *shurūṭ*."[12] This kind of precaution is there for every lawyer today who is about to draw up a contract, will, or some other deed for his client. The *ḥiyal* are a counterpart

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[8] See Schacht, *Introduction*, 81.

[9] Schacht, *Introduction*, 81; Coulson, *History*, 140-41.

[10] Al-Shāṭibī, *al-Muwāfaqāt*, 2:378-91, 4: 201.

[11] This happens to be the first *ḥīlah* in Shaybānī, *Kitāb al-Makhārij fī al-Ḥiyal*, (Schacht, ed.), 1, printed in *Beitrage zur semitischen Philologie und Linguistik*, viii, 1968.

[12] Schacht, *Introduction*, 210.

of *shurūṭ* literature. They have been given separate treatment by the jurists not only because of their importance, but due to the fact that most of the procedural literature has been given separate treatment. Incidentally, this too is a fact that Schacht does not fail to recognize. He says:

> The works on *ḥiyal* and the works on *shurūṭ* belong to a well defined branch of Ḥanafī legal literature, together with works on *waḳf*, on legacies, on the minutes (*maḥḍar*) and written judgments (*sijill*) of the *ḳāḍīs* and the duties of the *ḳāḍī* (*adab al-ḳāḍī*) in general, and, at a certain distance, on maintenance. All these subjects are of importance for the application of Islamic law in practice, and they tend to appear in combination among the works of a series of highly esteemed Ḥanafī authors over several centuries.[13]

Finally, the *ḥiyal* are not legal fictions in the sense of the Roman law or the English common law. This fact has been recognized by Vesey-Fitzgerald and Coulson.[14]

It would be reasonable to conclude that the *ḥiyal* belong to a large body of procedural law. They were meant as guidelines for lawyers drawing up contracts or advising individuals in matters of the personal law as well as commercial law, and it is incorrect to equate the *ḥiyal* with legal fictions that are intended to counter the rigidity of the law. They had nothing to do with the bridging of the gap between theory and practice nor do they indicate the rigidity of the law. As for Goldziher's views about "soul-destroying pedantry" and "quibbling legalism," perhaps, he would have said the same thing about many hair-splitting lawyers of the modern age, if they were given authority over matters of faith.

[13] Schacht, *Introduction*, 83.

[14] Vesey-Fitzgerald, "Nature and sources of the *Sharī'ah*," *Law in the Middle East*, 107; Coulson, *History*, 140.

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Glossary

adab al-qāḍī: The duties of, and procedure followed by, the judge (*qāḍī*).

'ādilah: Just. See also *'adl.*

adillah ijmālīyah: The general evidences for the law that contain within them the specific evidences. The Qur'ān, for example, is a general evidence, while a verse of the Qur'ān pointing to a *ḥukm* is a specific evidence or the *dalīl tafṣīlī.*

adillah tafṣīlīyah: Specific evidence. See also *adillah ijmālīyah.*

'adl: Justice. A morally upright witness.

'afw: Pardon. Pardon in the law of retaliation (*qiṣāṣ*), that is, the *lex talionis.*

aḥkām: Plural of *ḥukm* (rule).

ahlīyah: Legal capacity.

ahlīyat al-adā': Legal capacity for execution.

ahlīyat al-wujūb: Legal capacity for the acquisition of rights and obligations.

'amalī: Pertaining to conduct.

a'māl: Plural of *'amal* (conduct).

'amal: Conduct. The principle used by Mālik ibn Anas to refer to the practice of the people (jurists) of Medina.

'amalīyah: Pertaining to conduct or acts.

amānah: Trust. Bailment.

'āmm: General. A general word or textual evidence, as distinguished from a particular word (*khāṣṣ*).

amr: Command.

'aqā'id: Belief. Tenets of faith.

'āqilah: A group of persons who pay the bloodwit (*diyah*) on behalf of the offender.

'aql: Reason. The fourth interest secured by the *sharī'ah* and recognized as a purpose of the law.

'arīyah: The sale of fresh dates on trees in return for dry dates—permitted as an exception to the rules of *ribā* (usury).

arkān: The elements or essential ingredients of an act, without which the act is not legally valid.

ashbāh: Similar cases or attributes.

ashbāh wa naẓā'ir: Similarities (in undistinguished cases) and precedents.

aṣl: Origin; root; foundation. Source of law. The established case that forms the basis of the extension of the *ḥukm* in *qiyās* (analogy). A principle of law. The principal amount in a debt.

aṣl mu'ayyan: A text that supports a general principle. Such a principle is called *munāsib mulā'im.*

'atah: Idiocy. A natural defect for the capacity of execution (*ahlīyat al-adā'*).

āthār: Traditions reported from the Companions of the Prophet (God's peace and blessings be upon him).

'ayn: The corpus or substance of a thing. A thing present as distinguished from one that is absent at the time of the contract. In Ḥanafī terminology, it is a thing that is to be determined through weight or measure during a transaction of sale.

a'yān: Plural of *'ayn.*

'azīmah: A rule initially applied as a comprehensive general principle to which exceptions or provisos are provided by the law later. The exception is called *rukhṣah.*

bāligh: A person who has attained puberty. Puberty is the outward sign of majority and discretion. In the absence of puberty, jurists determine different ages for the presumption of puberty.

bāṭil: Nullity; void.

bay': A comprehensive term that applies to sale as well as many other transactions that are not strictly referred to as sales in positive law.

bay'ah: The oath of allegiance.

bayān: Explanation. Technically, the explanation (*bayān*) refers to the elaboration of meanings in the texts. An explanation for a text

of the Qur'ān that has not been elaborated is to be sought first in the *Sunnah* and then through other sources like usage etc.

bayt al-māl: Treasury.

bid'ah: Innovation.

bukhl: Nigardliness.

bulūgh al-nikāḥ: The age of puberty or the age of eligibility for marriage.

dalālāt: The different ways in which the meanings of texts and their implications are understood.

dalālat al-lafẓ: The implication of the text.

dalālat al-naṣṣ: The implication of an explicit text.

dalīl: Evidence. In a literal sense the term means guide, but in technical terms it refers to an evidence that points to or indicates a rule (*ḥukm*).

dalīl al-khiṭāb: The implication of the text. It is used by some to mean the *mafhūm mukhālafah* or the counter indication of the text.

dalīl ijmālī: See *adillah ijmāliyah.*

dalīl kullī: The same as *dalīl ijmālī.* It also refers to a general principle.

dalīl tafṣīlī: See *adillah ijmāliyah.*

dār al-ḥarb: Enemy territory not under the jurisdiction of a Muslim state.

dār al-Islām: The area under the juridiction of the Muslim state.

ḍarūrah: Necessity. A principle used for permitting forbidden things in case of duress or extreme hardship.

ḍarūrāt: See *ḍarūrī.*

ḍarūrī: Necessity. The term has particular significance for the purposes of law, the preservation of which is a necessity.

da'wāh: Invitation.

dīnī: Pertaining to *dīn* (religion).

dhimmah: The equivalent of legal personality in positive law. A receptacle for the capacity for acquisition.

diyah: Compensation for injuries of loss of life; bloodwit.

diyāt: Plural of *diyah*

dunyawī: Pertaining to the temporal.

duyūn al-maraḍ: The debts that become due during death-illness. They restrict the power of disposal of the person suffering from death-illness.

fāsid: Vitiated; irregular. It is also used in the sense of voidable in the positive law. A contract, hoever, is voidable at the option of the parties, while the *fāsid* contract can become valid only if the offending condition is removed.

faḍl: Excess. The term is used for *ribā*, which is excess in the exchange of two counter-values, whether determined through weight or measure or realized through delay in the delivery of one of the counter-values.

falāsifah: The philosophers.

faqīh: Jurist.

farā'iḍ: The rights in inheritance.

farḍ: Obligatory. A term used by the Ḥanafīs to distinguish an obligation established through a definitive evidence as against one that is established through a probable evidence, which is referred to as *wājib*.

Fiqh: A knowledge of *sharī'ah*, that is, the law.

al-fiqh al-aṣghar: The minor *fiqh*. A term applied by Abū Ḥanīfah to refer to a knowledge of the law excluding the *fiqh* of tenets of faith.

al-fiqh al-akbar: The knowledge of law as well as the tenets of faith.

fuqahā': Plural of *faqīh* (jurist).

furū': The individual cases of the law as distinguished from the *uṣūl* or sources.

furūq: The art of distinguishing apparently similar cases.

gharīb: A principle or rule that is alien to the generally acknowledged propositions of the law.

ghayr shar'ī aḥkām: Rules that do not pertain to the law.

ḥadd: Limit; boundary. A fixed penalty prescribed as a right of Allāh. Some jurists have used the term to indicate the larger doc-

trine of *ḥadd* that incorporates all the rights of Allāh. Together, these form the boundary conditions of the entire legal system within the framework of which the rest of the law has to be developed.

ḥadīth: Saying. The written record of the *Sunnah*. One *ḥadīth* may contain more than one *Sunnah*.

ḥājāt: Needs; necessities. Used for the secondary purposes of the law that are complementary to the five primary purposes or the *ḍarūriyāt*.

ḥājī: See *ḥājāt*.

ḥajr: Interdiction.

Ḥākim: The Lawgiver. The Lawgiver in Islamic law is Allāh Almighty. In the discipline of *uṣūl*, the *Ḥākim* is considered to be the first *rukn* (element) of the *ḥukm shar'ī*.

ḥaqīqī 'aqlī: The concrete norms acknowledged by the *shar'*. The term was used by al-Ghazālī.

ḥaqq Allāh: The right of Allāh.

ḥaqq al-'abd: Right of the individual.

ḥaqq al-salṭanah: The right of the state as distinct from the right of Allāh.

ḥaqq al-sulṭān: See *ḥaqq al-salṭanah*.

ḥarām: Prohibited.

ḥawl: One year. The prescribed period after which payment of *zakāh* becomes due.

ḥayḍ: Menstruation.

hazl: Jest. Refers to cases where utterances made in jest may have legal effects. The examples are marriage, divorce, and manumission.

hibah: Gift.

ḥikmah: Wisdom. The purpose or spirit of the law. There is a difference of opinion among jurists whether the *ḥikmah* can be used as an underlying cause to extend the *ḥukm*.

ḥifẓ: Preservation. The word was used by al-Ghazālī with reference to the purposes of law.

ḥīlah: See *ḥiyal.*

ḥiyal: Plural of *ḥīlah.* A legal device for evading the incidence of the strict law. Also referred to as legal fictions. Legal fictions, however, have a different function to perform in positive law.

ḥirz: The place of safe-custody for property with reference to the offense of theft. Possession of property for purposes of *ḥirz* may be actual or constructive.

ḥisbah: Accountability; reckoning. The institution of the ombudsman.

ḥudūd: Plural of *ḥadd.*

ḥujjah: Proof; demonstrative proof. An evidence in the sources that forms the basis of persuasive legal reasoning.

ḥukm: Rule; injunction; prescription. The word *ḥukm* has a wider meaning than that implied by most of the words of English deemed its equivalent. Technically, it means a communication from Allāh, the Exalted, related to the acts of the subjects through a demand or option, or through a declaration. According to this definition, the word *ḥukm* includes obligation-creating laws, declaratory laws, and even those that may be based upon positive decrees or on custom. Thus, the meaning is much wider than the "command of the sovereign" contemplated by John Austin for positive law.

ḥukm shar'ī: See *ḥukm.* The term *ḥukm shar'ī* is used to apply to its four elements: the Lawgiver (Ḥākim); the law or *ḥukm* itself; the *maḥkūm fīh* or the act; and the subject or *maḥkūm 'alayh.*

ḥukm taklīfī: The obligation-creating rule. The primary rule of the legal system.

ḥukm waḍ'ī: The declaratory *ḥukm.* A secondary rule of the system that facilitate the operation of the primary rules.

ḥuqūq al-'ibād: The plural of the right of the individual. In the collective sense, it may be considered as the right of the community and would then be the same thing as the right of the state.

ḥusn: Good. In Islamic law, the term is used with reference to reason and natural law.

'ibādah: Worship.

'ibādāt: Plural of *'ibādah.*

ibqā': Preservation. The term was used by al-Ghazālī to indicate the positive or affirmative aspect of the purposes of law as compared to the defensive or protective. For example, in the case of the first interest of *Dīn*, prayer has to be established from the affirmative aspect, while protection requires the defense of *Dīn* through *jihād*.

iḍṭirār: Duress; necessity.

'iffah: Chastity.

ighmā': Fainting.

iḥrām: The ritual state of *iḥrām* required for the *'umrah* or *ḥajj*. It also refers to the intention to perform the *'umrah* or *ḥajj*, which is part of the total ritual state.

ījāb: Obligation-creating command.

ijārah: Hire; rent.

ijmā': Consensus of opinion. In the parlance of the jurists it is the agreement upon a *ḥukm shar'ī* by the *mujtahids* of a determined period. This defintion would exclude the employment of this principle by a political institution, unless it is composed of *mujtahids*.

ijtihād: The effort of the jurist to derive the law on an issue by expending all the available means of interpretation at his disposal and by taking into account all the legal proofs related to the issue.

ikhālah: Reasoned conviction. A method used by the Shāfi'ī jurists for extending the law on the basis of a highly persuasive and convincing norm. The method is rejected by other schools.

ikhtilāf al-fuqahā': The differences of the jurists. This title is used for the discipline that may be referred to as applied *uṣūl*, as distinguished from *uṣūl al-fiqh*, which is theoretical and highlights the assumptions of the jurists or their schools with respect to the sources of law or the rules of interpretation.

īlā': A pronouncement by the husband of abstention from sex with his wife. It leads to divorce if observed for a determined period.

'illah: The underlying legal cause of a *ḥukm*, its *ratio decidendi*, on the basis of which the accompanying *ḥukm* is extended to other cases.

imām: Leader.

insānīyah: The attribute of being a human. It is considered to be the basis for the assignement of personality, which in turn enables

a person to have legal capacity. A fictitious person may not be assigned personality on the basis of this rule.

iqāmat al-ḥudūd: Establishing the *ḥudūd*. It is deemed to be the primary duty of the ruler. Thus, the ruler must have the qualifications required of a witness in *ḥudūd* cases.

ishtirāk: Equivocality.

isnād: The chain of transmission of a tradition.

isqāṭ: The extinction of a right.

istidlāl mursal: Legal reasoning that is based on a principle freed from the hold of individual texts, that is, it is let go into the realm of the purposes of the law.

istiḥsān: The principle according to which the law is based upon a general principle of the law in preference to a strict analogy pertaining to the issue. The principle is used by the Ḥanafīs as well as the Mālikīs. This method of interpretation may be employed for various reasons including hardship.

istiṣḥāb: A principle within the Shāfi'ī system, which in general terms means: the status quo shall be maintained. In a more technical sense, it means that the original rule governing an issue shall remain operative. In such a case, the primary rule assigned to all issues is that of permissibility. Sex activity, however, does not fall within such original permission.

istiṣlāḥ: As distinguished from the broader principle of *maṣlaḥah*, it is a principle that permits a more flexible type of analogy as compared to *qiyās*.

istiqrā': Induction.

i'tikāf: Seclusion in a mosque for worship.

itlāf: Destruction; damage; injury to limbs of the human body.

'itq: Manumission; emancipation.

janīn: The fetus. Strictly speaking it is the stage of the fetus when the woman is 'quick with child.'

jihād: Struggle in the way of Allāh.

jins: Genus.

jizyah: Tax imposed on non-Muslim citizens of a Muslim state. These citizens are not liable for *zakāh*.

jumhūr: Majority (of the jurists).

junūn: Insanity.

juzāf: Heap. Grain or goods sold in heaps by estimate.

juz'ī: An individual category within a genus. It refers to a specific evidence within a general evidence.

ḳādī: See *qāḍī*.

kaffārah: Plural *kaffārāt*. Expiation.

khāṣṣ: Particular; specific; particular word.

khabar wāḥid: It is a report from the Prophet that does not reach the status of *tawātur*, or of *mashhūr* according to the Ḥanafīs, that is, there are one or two narrators in its chain in the first three generations: Companions, *Tābi'ūn*, and their followers. As compared to this, the *mashhūr* report has one or two narrators among the Companions, but it reaches the status of *mutawātir* in the generation of the *Tābi'ūn*.

khalīfah: Caliph.

khamr: Wine.

kharāj: Revenue derived from land.

khilāf: Juristic differences.

khilāfah: The Caliphate.

khiṭāb: Address; communication.

khiṭāb jinā'ī: The communication forming the basis of criminal liability.

khiyālī iqnā'ī: Probable norms.

khiyār: Option.

khums: The fifth of spoils.

kullī: General; general evidence. See *juz'ī*.

kullīyāt al-sharī'ah: The definitive general principles of the *sharī'ah*.

māl: Wealth.

māni': Obstacle.

maḍarrah: Harm; injury.

mafhūm al-mukhālafah: The implication contrary to the actual meaning of a text.

maḥḍar: Record of findings (by the judge).

maḥkūm 'alayh: The subject.

maḥkūm bih: The act of the subject to which the *ḥukm* is related.

maḥkūm fīh: See *maḥkūm bih.*

maḥẓūr: Prohibited.

majnūn: Insane.

makrūh: Reprehensible; abominable; disapproved.

makrūh karāhat al-taḥrīm: Disapproval that is akin to pohibition.

makrūh karāhat al-tanzīh: Disapproval that is closer to permissibility.

manāṭ: The support or place of suspension of another thing. The underlying cause on which the *ḥukm* is suspended.

mandūb: Recommended.

manfa'ah: Utility.

maqāṣid: Purposes.

maqāṣid al-sharī'ah: The purposes of the *sharī'ah*, whose preservation and protection amounts to the securing of an interest (*maṣlaḥah*).

maraḍ: Illness.

maraḍ al-mawt: Death-illness.

marīḍ: The sick subject.

maṣāliḥ: Interests preserved and protected by the *sharī'ah.*

maṣdar: Source.

maṣlaḥah mursalah: An interest that is not supported by an indiviual text, but is upheld by the texts considered collectively.

mashaqqah: Hardship.

maṣlaḥah: The principle that the *sharī'ah* has determined goals or purposes and the securing of these purposes is an acknowledged interest (*maṣlaḥah*).

ma'tūh: Idiot.

maẓālim: Violation of rights.

maẓinnah: Location. The outward indication of an actual cause of a *ḥukm*, like puberty for maturity and discretion, or sleep for the actual acquisition of impurities, or penetration for actual ejaculation in the offense of unlawful sexual intercourse.

mithl: Similar; substitute; fungible.

mu'āmalāt: Transactions.

mu'aththir: Effective; the effective cause.

mu'aththir munāsib: The effective cause that is also compatible with the purposes and general propositions of the law.

mubāḥ: Permissible.

mubāya'ah: The oath of allegiance. See *bay'ah*.

muḍārabah: Partnership where the working partner shares the profits, but not the loss.

mūdhin: A permitting evidence.

muḥṣan: Married; chaste; free. The term is generally used in the context of the offense of unlawful sexual intercourse where it is applied to mean a married or once married person.

muḥtamal: Probable meaning.

mujmal: The word whose meaning has not been elaborated by the text. The elaboration requires recourse to other texts.

mujtahid: The independent jurist, who is qualified to derive the law and is under an obligation to follow his own opinion.

mujtahid fī al-madhhab: The jurist who is independent with respect to the opinion he derives, but follows the founder of a school with respect to the principles of interpretation. In other words, he observes *taqlīd fī al-uṣūl*, but not *taqlīd fī al-furū'*.

mujtahad fīh: A matter that is subject to interpretation.

mujtahid muṭlaq: The absolute jurist—usually the founder of a school, who follows his own opinion even with respect to the rules of interpretation.

mukallaf: The subject.

mukhīl: A persuasive or convincing attribute derived through *ikhālah*.

muktasabah: Derived.

mulā'im: Compatible.

mulā'amah: Compatibility.

mulghā: A principle rejected by the law.

munāsabah: The conformity between an attribute and the purposes and the general propositions of the law.

munāsib: An attribute conforming with the purposes of law.

munāsib gharīb: An attribute that conforms with the purposes of the law, yet it is not acknowledged by the law.

munāsib mulā'im: A principle that conforms with the purposes of the law and is also supported by an individual text.

munāsib mu'aththir: A rule that is compatibe with the purposes of the law and its underlying cause is indicated explicitly by the texts or by direct implication.

munāsib mulā'im: A principle for which the underlying cause has been derived by the jurists from a text, and the principle also conforms with the purposes of the law.

muqallid: One who follows the opinion of another.

mursal: Released; let go. A rule in which the hold of individual texts is released.

mursal gharīb: A principle that is not supported by an individual text nor is it compatible with the purposes of law.

mursal mulā'im: A principle that is not supported by an individual text, but it is supported by the purposes and general propositions of the law.

mushrik: Polytheist.

mustanbiṭah: Derived.

naṣṣ: Text; definitive implication of the text.

naẓarī: Theoretical.

nabīdh: Mead of dates.

nadb: Recommended.

nafl: Supererogatory.

nafs: Self; life. An interest secured by the *sharī'ah* as a purpose of the law.

nahy: Proscription.

naskh: Abrogation.

nasl: Lineage; progeny.

nifās: Post-natal state of a woman.

niṣāb: The minimum scale provided for an area of the law. For *zakāh* and theft, for example, it is a minimum amount of wealth that imposes liability, while in evidence it is the *niṣāb* of one man and two women who render testimony.

nisyān: Forgetfullness.

qaḍā': The judicial office. Also used for delayed performance of an act.

qāḍī: Judge.

qā'idah kullīyah: A general principle whose *ḥukm* is uniformly applicable to each of its categories.

qā'idah uṣūlīyah: A principle of interpretation used in the discipline of *uṣūl al-fiqh*.

qānūn: Law made by the Ottoman rulers.

qadhf: False accusation of unlawful sexual intercourse. The liability can arise indirectly when a person is accused of being illegitimate through an abuse.

qarḍ: Loan.

qarḍ ḥasan: A gracious loan in which interest is not charged nor is a period of repayment fixed.

qaṭ'ī: Definitive.

qatl 'amd: Wilful homicide; murder.

qawā'id al-fiqh: General principles derived from a number of cases in *fiqh*

qawā'id fiqhīyah: See *qawā'id al-fiqh*.

qawā'id uṣūlīyah: Principles employed for the interpretation of texts.

qawānīn uṣūlīyah: See *qawā'id uṣuliyah.*

qiṣāṣ: Retaliation for loss of life or limb; *lex talionis.*

qiyās: Analogy; syllogism. The extension of the *ḥukm* of a spe case established in the texts to a new case awaiting decision the basis of a common underlying cause.

qiyās fī ma'nā al-aṣl: Same as *qiyās al-ma'nā.*

qiyās al-'illah: The regular form of analogy in which an underly cause is employed for the extension of the *ḥukm*, as distinguis from *qiyās al-ma'nā* or even *qiyās al-shabah.*

qiyās al-ma'nā: The extension of the *ḥukm* from a lower-or meaning to a case falling under the higher-order meaning ide fied through the implication of the text. If the text of the Qur says that one should not say even 'fie' to parents, then, taking as the lower-order meaning we extend the *ḥukm* to more griev cases of abuse. This form is considered the strongest type of a ogy. According to the Ḥanafīs, this is not analogy, but the im cation of the text—*dalālat al-naṣṣ.*

qiyās al-shabah: Analogy on the basis of attributes that can qualify as underlying causes in the strict form of *qiyās al-'il* A form of analogy that is more flexible than *qiyās.* It is used judges in the positive law systems.

qubḥ: Evil. See *ḥusn.* Pertains to questions of natural law and reas that is, whether reason can discover good or evil independently the *sharī'ah*

ra'y: Personal opinion; judge-made law. A term used for the met of the Ḥanafīs by the Ahl al-Ḥadīth.

rajm: Stoning to death for the offense of unlawful sexual intercou by a married or once-married person.

rashīd: One who possesses *rushd*—discretion.

ribā: Usury; interest. The unjustified or uncompensated excess the exhange of two counter-values in a transaction of excha when the excess is revealed either through weight or measure through benefits arising from delayed delivery.

riqq: Slavery.

rujū': Retraction of confession, divorce, and the like.

rukhṣah: Exemption. See *'azīmah.*

rukn: Element; ingredient. An essential element of an act without which the act cannot be said to be valid.

rushd: Discretion; maturity.

ṣā': A mesure of volume.

sabab: Cause.

ṣabī: Minor who has not reached the age of puberty.

ṣabī ghayr mumayyiz: Minor under the age of seven or one who cannot discriminate between good and bad.

ṣabī mumayyiz: The discriminating minor. Such a minor may be allowed to enter into beneficial transactions by his guardian.

ṣadaqāt: Charity.

ṣadaqah: Charity; *zakāh*.

ṣadaqat al-fiṭr: The poor-due payable before the *'Īd al-fiṭr*.

sadd al-dharī'ah: The plugging of lawful means to an unlawful end.

safah: Prodigality.

safīh: Prodigal.

ṣaḥīḥ: Sound; valid.

sā'imah: Freely pasturing animals.

salam: Advance payment for delivery of future goods.

salṭanah: State.

samāwīyah: Natural; pertaining to the heavens.

sanad: The evidence relied upon. The *sanad* of *ijmā'*.

sariqah: Theft.

shabah: Similarity.

shahādat al-aṣl: The support of a specific text for a rule or general principle.

shar': The law.

shar'ī: Legal.

shar'ī aḥkām: The body of rules that collectively form the content of the *sharī'ah*.

sharī'ah: Islamic law.

sharīk: Partner.

sharikah: Partnership.

shar'īyah: Legal.

sharṭ: Condition.

shawkah: Power. The doctirne of power recognized by al-Ghazālī in Islamic political theory as means for guaging divergent opinions.

shubhah: Doubt.

shubhah fī al-dalīl: The doubt in the mind of the subject as to the controlling evidence of the law.

shubhat al-milk: The benefit of doubt given to the accused when there is a likelihood of confusion about his valid ownership of the subject-matter of the offense.

shurb: Drinking.

shurb al-khamr: The offense of drinking wine (*khamr*).

shurūṭ: Plural of *sharṭ*: condition. The art of conveyancing. The books of al-Ṭaḥāwī are well known for the discipline of *shurūṭ*.

ṣīghah: Form; proposal.

ṣiḥḥah: Validity.

ṣighar: Minority.

sijill: Record of depositions.

siyar: The laws of war.

siyāsah 'ādilah: Just administration—when it conforms with the genreral principles of the *sharī'ah*.

siyāsah shar'īyah: The administration of justice by the state beyond the explicit law of the *sharī'ah*.

siyāsah ẓālimah: Tyrannical administration of justice, that is, when it is not in accordance with the general principles of the *sharī'ah*.

sulṭān: Ruler of a sultanate.

Sunnah: The precedents laid down by the Prophet to be followed as binding law. These may be through statements, acts, or approvals.

ta'addī: Tort; negligent conduct; transgression.

ṭabaqāt: The grades of the jurists.

ta'dīb: The act of disciplining akin to ***ta'zīr.***

tafsīr: Commentary; interpretation.

taḥqīq al-manāt: The verification of the attributes of an established case in a new case offered for examination. This process does not need a jurist. For example, a beverage may be examined to see if it is an intoxicant. This may need a chemist or pharmacist not a jurist.

taḥrīm: Prohibition.

taḥsīnāt: The thrid category of puposes that are complementary to the first two categories.

taḥsīnī: A purpose of the law placed in the third category where it acts as a complementary interest.

takhyīr: Picking and choosing of opinions. The choice given to the wife with respect to divorce.

taklīf: Obligation.

taklīfī: Obligation-creating rule.

talfīq: The construction of an opinion through bits and pieces extracted from various opinions.

tamlīk: The transfer of the right to divorce to the wife.

tamr: Dates.

taqlīd: Following the opinion of another without questioning the *dalīl* on which reliance is placed.

targhīb: Inducement.

tarjīḥ: Preference of one evidence over the other.

taṣarrufāt: The general propositions of the law. This is the way al-Ghazālī has used this term.

tawātur: Authentic transmission of reports and texts. A text or tradition reported by so many people in the first generation that its authenticity cannot be doubted.

tawassu': Facitlity.

tawassu' wa taysīr: Facility and ease.

tawkīl: Delegation of powers.

taysīr: Ease.

ta'zīr: Discretionary penalties. Some jurists consider *ta'zīr* penalties to apply to genus of those crimes for which *ḥadd* penalties have been prescribed, but where *ḥadd* cannot be applied for want of required evidence or fulfillment of conditions. Jurists in the present times give a wider scope to *ta'zīr* and consider it to apply to all punishments other than *ḥudūd* and *qiṣāṣ*.

thawāb: Reward for the Hereafter.

'ulamā': Scholars; jurists.

ūlu al-amr: Those in authority.

ummah: The Muslim nation.

'umrā: Visit to Mecca.

'urf: Custom; usage. The usage during the period of the Prophet, which helps in discovering the original intent of the lawgiver.

'ushr: Ten percent tax on produce of unirrigated land.

uṣūl al-fiqh: Legal theory; systems of interpretation; sources of Islamic law.

uṣūl kullīyah: General principles.

uṣūl: Plural of *aṣl*. Principles.

uṣūlīs: Legal specialist dealing with the principles of interpretation.

wājib: Obligatory.

waḍ'ī: Declaratory.

waṣf: Attribute; potential underlying cause.

waṣīyah: Bequest.

waḥī: Revelation.

wakālah: Agency.

wakālah 'āmmah: General attorney.

wakīl: Agent; attorney.

walī: Guardian.

waqf: Trust; endowment.

wilāyāt: The jurisdiction of the ruler.

wilāyah: Guardianship; authority.

wujūb: Obligation.

yad: Hand; arm; forearm.

yamīn: Oath.

zabīb: Raisins.

zakāh: The compulsory levy on wealth for the poor imposed as a right of Allāh.

ẓiḥār: Injurious assimilation (of wife to mother), that is, refraining from sexual intercourse with wife after saying to her: "you are for me like the back of my mother."

zinā: Unlawful sexual intercourse including adultery.

ẓāhir: The apparent or literal meaning.

ẓālimah: Tyrannical.

ẓannī: Probable.

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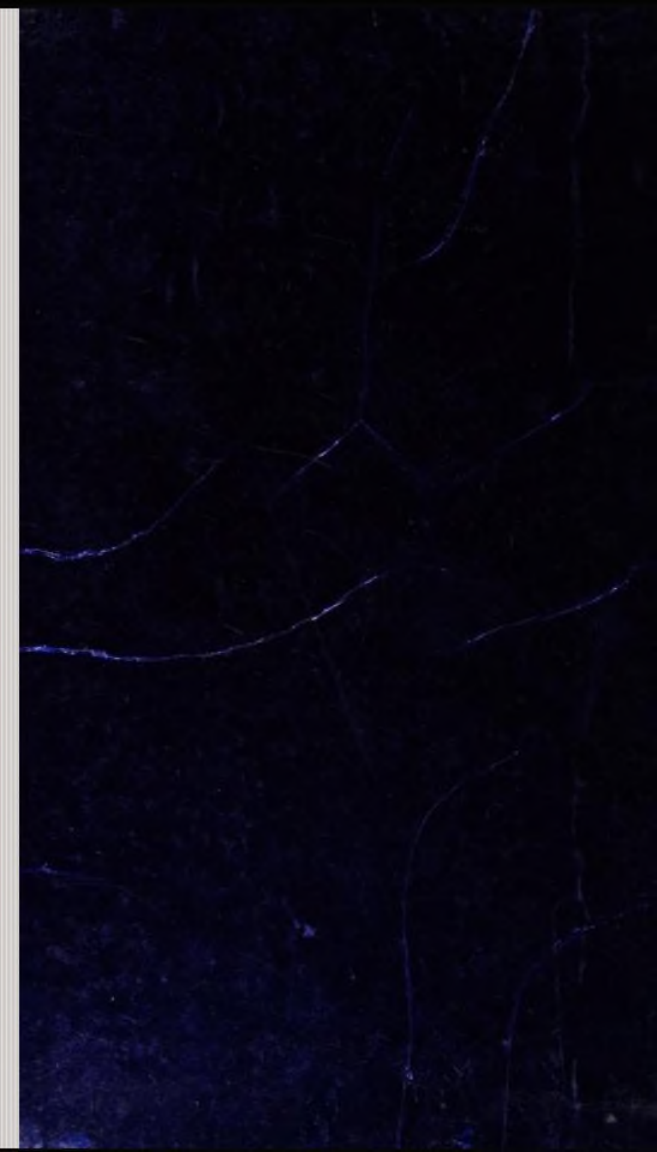
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